

CUL-405217-106-LP1913

(III)

# Judge of the High Court.

1963

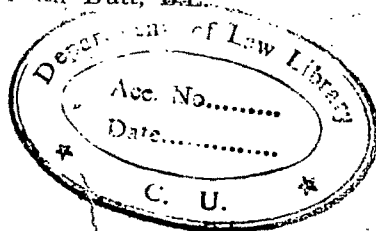
CHIEF JUSTICE.

The Hon'ble Mr. Justice Himansu Kumar Bose, Barrister-at-Law.

PUISNE JUDGES :—

The Hon'ble Mr. Justice Prasanta Behari Mukharji Barrister-at-Law.

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- „ Ranendra Nath Dutt, B.L.



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Government Pleader:—  
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Additional Government Pleader:—  
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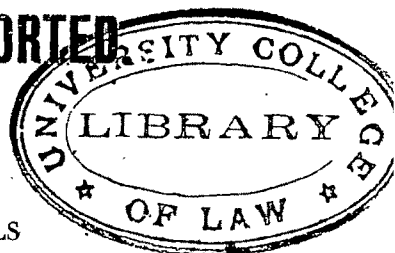
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# THE CALCUTTA LAW JOURNAL

1963 }

CALCUTTA

{ 1

## CIVIL RULE

*Before the Hon'ble Mr. Justice R. S. Bachawat and  
the Hon'ble Mr. Justice U. C. Law.*

M/S. RAMANATH ESTATE (P) LTD.

Vs.

THE STATE OF WEST BENGAL & ORS.

Civil

1963

January, 14.

*Agency—Scope of—Common Law Rule—Land Acquisition Act, 1894 (Central Act I of 1894),  
—Enquiry under—Claimant, if entitled to appear by agent—S. 18—Reference petition  
under, if to be signed by claimant himself*

Whatever a person has power to do himself, he may do by means of an agent. There are, however, two exceptions to this general rule, namely, (1) where the transaction is required by statute to be evidenced by the signature of the principal himself; (2) where the competency to do the act arises by virtue of the holding of some public office or by virtue of some power, authority or duty of a personal nature and requiring skill or discretion for its exercise, or where a statute imposes on a person a duty he is not free to delegate.

With regard to the first exception, the true rule is that unless a particular statute expressly or by necessary implication or intendment excludes the common law rule, the latter must prevail (*Commissioner of Agricultural Income-Tax, West Bengal vs. Keshab Chandra Mandal*(1), followed).

At all stages of the enquiry by the Collector and also at the time of the making of the award under the Land Acquisition Act, 1894, the claimant is entitled to appear personally or by his agent. There is no indication in the Act of any general intention on the part of the Legislature requiring the personal signature of the claimant on the statements and applications filed before the Collector on his behalf.

The requirement of a written application does not necessarily imply that the application must be signed by the applicant (*Thakur Umed Singh vs. Sobhag Mal Dhadha*(2), followed).

The material facts will appear from the Judgment:—

B. B. Das Gupta, D. P. Chowdhury—for the Petitioner.

C. N. Mookerjee—for the Opposite Party No. 2.

Nirmal Chandra Chakraborty (G.P.) for the Opposite Party No. 1.

The Judgment of the Court was as follows:—

**Bachawat, J.:**—These rules are directed against an order of the Special Land Acquisition Judge, Alipore, dated the 5th September 1959 rejecting the references made by the collector at the instance of the petitioners under section 18 of the Land Acquisition Act, 1894 read with section 8 of the West Bengal Land Development and Planning Act (Act XXI of 1948) on the ground that these references were incompetent. The references were made

(1) (1950) S.C.J. 364.

(2) (1915) 43 I.A. 1.

\* Civil Rule Nos. 4299 to 4302/1959.

by the collector on the written applications signed on behalf of the petitioners by their respective pleaders. In each case the vokalatnama of the pleader signed by or on behalf of the petitioner concerned was filed before the collector before the application was made to him. Section 18 of the Land Acquisition Act 1894 provides that any person interested who has not accepted the award may, by written application to the collector, require that his objection to the award be referred by the collector for the determination of the court. In the instant cases the written application was not signed by the petitioner concerned but was signed by his pleader on his behalf. The question is whether in these circumstances the references are incompetent. Now the normal rule is that the party can do by means of an agent what he can do himself. The following passage in Halsbury's Laws of England, Third Edition, Volume 1 Art. 352 pages 147-48 accurately summarises the law on the point. "It may be stated as a general proposition that whatever a person has power to do himself he may do by means of an agent . . . . . There are, however two exceptions to the general rule that a person may do by means of an agent whatever he has power to do himself: (1) where the transaction is required by Statute to be evidenced by the signature of the principal himself (2) Where the competency to do the act arises by virtue of the holding of some public office or by virtue of some power, authority, or duty of a personal nature and requiring skill or discretion for its exercise, or where a statute imposes on a person a duty he is not free to delegate."

Admittedly the second exception has no application to the cases before us. The general rule and the firm exception are recognized in *The Commissioner of Agricultural Income Tax, West Bengal vs. Sri Keshab Chandra Mandal*(1). In that case Das, J. observed at page 367. There is no doubt that the true rule as laid down in judicial decisions and indeed as recognised by the High Court in the case before us is that unless a particular statute expressly or by necessary implication or intendment exclude the common law rule, the latter must prevail. It is, therefore necessary in this case to examine the Act and the rules to ascertain whether there is any indication there in that the intention of the Legislature is to exclude the common law rule." On a consideration of the Bengal Agricultural Income Tax Act (Act IV of 1944) and of the rules and the forms their Lordships of the Supreme Court held that there were clear indications of an intention on the part of the Legislature to insist on the person signature of the assessee, appellant or applicant whenever his signature was required by the Act and the Rules and that the common Law rule *qui facit per alium facit per se* was excluded by necessary implication and the intendment of the Act and the rules.

On behalf of the opposite parties it was argued that as section 5A(2), 9(2) and 12(3) specially provide for representation of the party interested by his pleader or his agent and as section 18(1) does not specially provide that he

(1) (1950) S.C.J. 364.

may by written application by his pleader or agent require the Collector to make the reference, the necessary implication and intendment of the Act is that he must be by a written application signed by him personally require the collector to make the reference. I am unable to accept this contention. Section 5A provides for hearing of objections to the preliminary notification issued under section 4 and sub-section (2) of section 5A specially provides that the collector must give the objector an opportunity of being heard either in person or by a pleader. Section 9 provides for issue of notices inviting claims to compensation after the publication of the declaration of the intended acquisition under section 6; and sub-section (2) of section 9 provides that the notice shall required all persons interested to appear personally or by agent before the collector and to state their respective interests, claims and objections, but that the collector may required such statement to be made in writing and signed by the party or his agent. It is to be noticed that unless required by the collector even the basis statement of the claimant as to his interests claims and objections need not be in writing signed by him or his agent. Section 11 provides for enquiry into the value of the land and into the interest, claims and objections of the claimants and for the making of the award by the collector under his hand, and section 12(2) requires the collector to give immediate notice of his award to each of the persons interested as are not present personally or by their representatives when the award is made. It is to be noticed that at all stages of the enquiry by the collector and also at the time of the making of the award the claimant is entitled to appear personally or by his agent. We find no indication in the Act of any general intention on the part of the Legislature requiring the personal signature of the claimant on the statements and applications filed before the collector on his behalf. Under section 18(1) the claimant may by written application, require the collector to make the reference and there is nothing in the Act to show that the claimant cannot do by his duly authorized agent what he could do himself. It is necessary that the claimant must require the collector by a written application that the matter be referred to court, but the section does not insist that the written application must of necessity be signed by the claimant. The requirement of a written application does not necessarily imply that the application must be signed by the application. See *Umed Singh vs. Subhag Mal*(1). In all the cases under discussion the duly authorised pleader of the claimant had signed the application. Before the application was presented to the collector the written authority of the pleader signed by the claimant was filed before the collector. The collector was satisfied that a proper written application on behalf of the claimant under section 18(1) had been duly made before him and that the other conditions of the section had been complied with. In these circumstances it must be held that the reference made by the collector were competent.

(1) (1915) 43 I.A. 1; 20 C.W.N. 137.

I may add that even assuming for a moment that the claimants should have put their signatures on the written applications, the absence of the signatures was a mere irregularity and did not affect the jurisdictions of the collector to entertain the applications and to make the references; and the references cannot be thrown out on the ground that they were incompetent and without jurisdiction.

The learned judge rejected some of the references on the ground that the relative applications before the collector were not filed within the time prescribed by section 18(2). In Cases Nos. 4299, 4300, 4302 of 1959 it was formerly admitted by Mr. Chakravartty and Mr. Mookerjee before us that the relative applications were filed within the prescribed time. In C.R. Cases No. 4301 of 1959 Mr. Chakravartty argued that the application of Hrishikesh Mitter as Karta representing his joint family had not been filed before the collector within the prescribed time. It is common case that Hrishikesh Mitter was neither present nor represented before the collector at the time when he made the award, and that his case is governed by the proviso (b) to section 18(2). Now Hrishikesh Mitter in his personal capacity was served with the notice under section 12(2) and in that capacity he duly filed an application under section 18(2) within six weeks of the date of the receipt of the notice. But no notice under section 12(2) was served upon him in his capacity as Karta of his joint family in his capacity as such Karta he was therefore entitled to apply within six months of the date of the award. His application as such Karta was duly made within that date and was not barred by limitation.

On behalf of the petitioners it was argued that the Land Acquisition Judge had no power at all to go into the question whether the conditions of section 18 had been satisfied. We prefer not to express any opinion on this question, as we have come to the conclusion that all the conditions of section 18 were satisfied.

We pass the following order.

The Rules are made absolute.

The order of the court below dated the 5th September 1959 rejecting the references made by the collector at the instance of the petitioners are set aside. We adjudge and declare that these references are competent and are entertainable by the court below. The references are remanded to the court below and the court below is directed to hear and dispose of them in accordance with law and in accordance with the observations made above. The State of West Bengal shall pay to the petitioner the costs of the Rules hearing fee being assessed at two gold mohurs in each case.

**Law, J.:**—I entirely agree with the judgment of my learned brother Bachawat, J. but I wish to add a few words to the main question, namely, whether under section 18 of the Land Acquisition Act the signature of the person interested who has not accepted the award is required on his written application to the collector requiring the matter to be referred for the determination of the court? It cannot be disputed that the Land Acquisition collector is merely the agent of the Government for the purpose of acquisition and is in no sense of the term a judicial officer nor is the proceeding before him a judicial proceeding. His enquiry and his valuations are departmental in their character and made for the purpose of enabling the Government to make a tender through him to the person interested. It has been held that it in such a proceeding the collector did not sufficiently consider the evidence produced by the owner but formed his opinion on materials not before him as evidence that would not render the proceedings bad *Ezra vs. Secretary of State*(1). The proceedings before the collector are administrative in character and not judicial and his award though conclusive against the Government is subject to the owner's right to have the matter referred to the court *Ezra vs. Secretary of State India in Council & ors.*(2). In the donor doubted the correctness of his valuation his remedy only lies under section 18 of the Act by virtue of which he can require the collector by a written application to refer the matter for determination of the court. The word "application" in any opinion is not to be understood as the word is understood in connection with judicial proceedings. I think the word "application" have is merely a demand or a request by the person interested to the collector to refer the matter to the court for judicial determination as the collector's award is not acceptable by him. The application is not the reference at all but is merely a request by the person interested to the collector inviting him to refer the matter.

It appears that in these cases the respective applications were signed by the pleader who held vakalatnamas in his favour from the persons interested. The collector had before him the said vakalatnamas and knew that the applications were signed by the pleader and were otherwise in order. The collector did not take any objection to the applications but acted upon them by duly referring the matters for the determination of the court as required by the applicant. Therefore the state of West Bengal cannot now be heard to say that the applications were defective.

In these premises there is no reason to depart from the general rule that whatever a person has power to do himself he may do by means of an agent and thus I have come to the conclusion that the signature of the duly authorised pleader on the respective applications were quite sufficient to satisfy the conditions of section 18 and the references are competent and entertainable by the court below.

(1) (1902) I.L.R. 30 Calcutta 85.

(2) (1905) 38 I.A. 93.

The learned judge of the court below erred in holding that the applications not having been signed by the person interested were invalid in law. The order dated 5 September 1959 is set aside.

I concur with the orders of my learned brother as passed in these matters.

N. C. S.

### CIVIL RULE

*Before the Hon'ble Mr. Justice Purushottam Chatterjee.*

Civil

1962

AMULYDHAN SAHA

Vs.

April, 17.

### THE STATE OF WEST BENGAL, DEPT. EXCISE & ORS.

*Bengal Excise Act 1909 (Bengal Act V of 1909)—classes of license under—Section 30 to 35, if limited to license for place—Section 36, effect of notification under, with respect to intoxicants other than spirit—Grant of license to a person, order of, if final under Section 35, if subject to revision under section 8(3).*

Chapters IV and VI of the Bengal Excise Act, 1909, indicate that a license has a direct reference to 3 things,—(1) a license for a place where the business may be carried on, (2) a license granted to a person who will hold the license and carry on the business and (3) a license given to sell one or more intoxicants.

Sections 30 to 34 of the Act deal with the license to carry on the business at a particular place. License in section 35 refers to a licensed premises, and is united to a license for a place. The grant of a license to a person to carry on the business does not come under section 35, but comes under the residuary section.

The intoxicant referred to in section 36 of the Act is intoxicant other than spirit. In the absence of any special notification by the State Government under section 36 extending the application of sections 30 to 35 to Pachwai, section 35 by itself will not apply to Pachwai. Therefore, the order of selection of a candidate for a Pachwai shop by the Commissioner is not final under section 35, and is liable to revision by the State Government under section 8(3) of the Act.

If an authority, who has power to decide on facts, decides erroneously on facts, no interference can be made under Article 227 of the constitution with such erroneous division.

The material facts will appear from the judgment:—

Sarat Chandra Janah, H. K. Basu—for the Petitioner.

Nirmal Chandra Sen, Prodyut Kumar Banerjee—for the Opposite Party No. 2.

Nirmal Chandra Chakraborty—for the State.

The Judgment of the Court was as follows:—

**Chatterjee, J.:**—This is an application under Article 227 of the Constitution of India against an order purported to have been passed under section 8(3) of the Bengal Excise Act, 1909 by the State Government on the advice

of the Minister-in-charge of Excise. There is no dispute that a certain "Pachwai" shop was advertised for sale and the petitioner before me is one of the persons who applied for the licence. The petitioner was granted a licence by the Additional District Magistrate as also by the Excise advised the State Government set aside the order and further advised that the opposite party No. 2 Prakriti Kumar Dutta should be granted the licence. Against this order the present petition, as I have stated, has been filed.

The first objection taken by Mr. Jana is that no petition was maintainable under section 8(3) of the Bengal Excise Act 1909 to the State Government. According to Mr. Jana, the State Government had no jurisdiction to entertain the revisional petition under section 8(3) of the Bengal Excise Act 1909. The argument of Mr. Jana is that this is a case which is governed by section 35 of the Bengal Excise Act. Under section 35 of the Act the Excise Commissioner shall consider the list objections and opinions so sent to him and may modify or annul any order passed or licence granted by the Collector; and notwithstanding anything contained in section 8, his orders shall be final. Provided if there is any difference of opinion between the Excise Commissioner and the Commissioner of Division, the matter will be referred to the State of Government. What Mr. Jana says is that there was no question of difference of opinion and as such the order of the Excise Commissioner is final and no petition would lie under section 8(3) of the Bengal Excise Act 1909 to the State Government Mr. Jana says that Chapter VI deals with licenses, permits and passes and with section 30 of the Act, that chapter begins then these are 31, 32 and 33 which deal with various aspects of licenses and then in sections 34, 35 it is stated that the order of the Excise Commissioner would be final.

We have to examine this argument of Mr. Jana. It is indeed true that Chapter VI relates to licenses, permits and passes but the question is: licenses for what purpose? If we refer to Chapter IV dealing with manufacture, possession and sale, we will find that section 13 of the Act provides that no intoxicant shall be manufactured except under certain conditions. Section 15 of the Act refers to the establishment of distilleries and ware house. Section 16 the Act says that license is required and no person shall, except under the authority and subject to the terms and conditions of a license granted on that behalf by the Collector, deposit or keep any intoxicant in any warehouse or establishment authorised or continued under the Act. Then section 18 of the Act says that no person shall have in his possession any intoxicant except under conditions. Section 22 says that the Provincial Government may grant license to any person, on such conditions and for such period as it may think fit, the exclusive privilege for manufacturing liquer. Section 25 also refers to a person who has got a license and the subsequent section as deal with comes the power of the District Magistrate to close the shop for which a license has been granted. If we refer to the various sections of Chapter IV we shall

get that a licence has a direct reference to three things firstly, a license for a place where the business may be carried on (sections 15 and 16) secondly, a license granted to a person who will hold the license and carry on the business (sections 18 and 19) and thirdly a license given to sell a particular intoxicant or a number of intoxicants (sections 19 & 20). Therefore the license granted under the Act refers to three aspects viz. a license granted to a person for selling certain intoxicant at a specified place. If we consider Chapter VI we shall get that viz. when the Government grants a license it grants with respect to three aforesaid matters, the first important element of which is the selection of the place. There may be objections of the public, objection of the Municipality or the Corporation as the case may be regarding the licensing of a particular premises where the intoxicant may be sold or manufactured. Therefore, before any license is granted to a person for selling something the authority shall find out where the shop is to be established. Under section 30 of the Act a list is to be prepared and that list is to be advertised. Thereafter objections are to be invited and then the Collector will consider the matter under section 34 of the Act. From sections 30 to 34 of the Act, the only matter which is for consideration is the license to carry on the business at a particular place. Section 35 of the Bengal Excise Act 1909 says that the Commissioner shall consider the list, objections and opinions shall consider the list, objections and opinions sent to him and may modify any order passed or license granted by the Collector. The Commissioner has got to consider the list of places objections to the places and opinions of third party regarding places and therefore, if he grants a license after consideration of all these matters the only license that can be granted is a licensing for the place where the business may be carried on by some persons not till then defined. Mr. Janah says that the license granted refers to the person to whom the license is to be granted and cannot refer to the place. As I have stated above, it is clear that the license is granted to a particular person for carrying on a business of selling particular intoxicant at a particular place. License in section 35 of the Act refers to a licensed premises and that is not beyond the scope of the Act. On the other hand, that is the first step before a license is granted to a particular person. Therefore, section 35 of the Act must be limited to a license for a place and not the license to a person. This section has nothing to do with a license to a person. Therefore, the order complained of does not come under section 35 of the Act but it clearly comes under the residuary section.

Mr. Sen has further referred me to section 36 of the Act. He says that the provisions of sections 30 to 35 as to licenses for the retail sale of spirit shall apply also in respect of licenses for the retail sale, in any local area specified in any order made by the Provincial Government in this behalf; of any other intoxicant specified in the said order. Mr. Sen says that section 36 of the Act refers to the sale of intoxicants where its section 30

of the Act refers to the retail sale of spirit. Pachwai is not spirit within the meaning of the Act. He refers to the definition of the word 'Spirit' which means under section 2(19) of the Act any liquor containing alcohol obtained by distillation whether it is denatured or not. 'Pachwai' is defined in section 2(16) which means fermented rice, millet or other grain, whether mixed with any liquid or not, and any liquid obtained therefrom, whether diluted or undiluted, but does not include beer. Section 36 of the Act says that the provisions of section 30 to 35 as to licenses for the retail sale of spirit shall apply also in respect of licenses for the retail sale, in any local area specified in any order made by the Provincial Government in this behalf of any other 'intoxicant specified' in the said order. This case does not relate to a license for spirit and this is a license for pachwai.

The section makes it clear that the intoxicant referred to in section 36 of the Act is intoxicant other than spirit. Therefore, if there is a special notification by the Provincial Government then section 30 to 35 may apply to other intoxicant including 'Pachwai' but according to Mr. Sen there is no such notification made by the Government of Bengal and the result is that section 35 of the Act would have no application. In view of the decision that I have arrived at, it is not necessary for me to consider further and to investigate whether there has been any notification or not. But according to Mr. Sen and according to Mr. Chakravarty on behalf of the Government no such notification has been issued. The result is that section 35 of the Act does not apply to this case and therefore, the order of the Excise Commissioner was not final and the opposite party No. 2 Prakriti Kumar Dutta had a right to the apply to State Government for revision and the order of the Excise Commissioner under section 8(3) of the Excise Act.

Coming now to the merits of the case Mr. Jana has referred to me to the order of the Minister in charge. He lays very great stress on paragraph 2 where the Minister observed as follows—

"Second ground for selecting Amulyadhan Saha viz. he lives fairly close to the shop offends against the Art 16(2) of the Constitution of India. No citizen, on grounds only of religion, race, caste, sex, descent, place of birth; residence or any of them be ineligible for or discriminated against in respect of employment etc. etc." Suffice it to say that had that been the only reason on which the Minister recommended, I would have no hesitation in setting aside the order but that is not the basis of the order. According to the Minister, for good or had reasons Amulyadhan Saha is not a reliable person. If an authority who has the power to decide on facts decides erroneously on facts I have no power to interfere under Article 227 of the Constitution. Mr. Janah says that the history of Mr. Prakriti Dutta, opposite party No. 2 is

not better but worse. All that find is that there are sufficient materials on the record to show that both of them were convicted and sentences to pay fine and all these matters have been considered and Prakriti Kumar Dutta, opposite party No. 2 was found a better and more suitable candidate and as such, I cannot interfere under Article 227 of the Constitution of India.

The result is that the Rule is discharged.

There will be no order as to costs.

N. C. S.

Rule discharged.

### APPELLATE CIVIL

*Before the Hon'ble Mr. Justice Ranadhir Singh Bachawat and  
the Hon'ble Mr. Justice Purushattam Chatterjee.*

Civil

MESSRS. TOLLYGUNGE CLUB LTD.

1961

Vs.

August, 9.

THE CORPORATION OF CALCUTTA.

*Bengal Municipal Act, 1932, Section 149—Rules 10 and 13 under Notification No. 5706M dated 10 December 1934, made under Cls. (a) and (b) of Section 215—Validity of assessment made contrary to—Natural justice—Quasi judicial body—Suit challenging such assessment, if his—Section 150.*

The requirement of Section 149 of the Bengal Municipal Act, 1932, and Rules 13 made under Section 215 of the Act under Notification No. 5706M dated 10 December 1934, that the Review Committee shall take evidence and make inquiry in the presence of the objector or his agent, is not an employ formality, but is one of the fundamental safeguards imposed by the Act and the Rules upon the conduct of the inquiry by the Committee.

The Review Committee or the Administrator discharging its function is a quasi judicial body.

Even apart from Section 149 of the Act and Rule 13, it was the duty the Administrator acting quasi judicially to conform to the fundamental principles which are required to be observed in the administration of justice in whatever form such justice is administered.

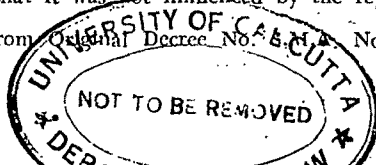
One of such fundamental obligations of a quasi judicial body is to allow the party affected to look at and scrutinize the evidence before it so that the party affected may make his representation on the matter, and, if necessary, to call rebutting evidence.

The right of the ratepayer to scrutinize the Assessors' report is implicit in Section 149 of the Act and Rule 13, as also in the fact that the Administration as a quasi judicial body must conform to the fundamental principles of judicial procedure.

Assuming that the Assessor's report itself was the subject matter of review, it was all the more necessary that the objector should be allowed to read and scrutinize the report, by the Administrator who had before him that report.

If the quasi judicial body had before it the Assessor's report, it does not lie in its mouth to say that it was not influenced by the report.

\* Appeal from Original Decree No. 304/1953.



Rule 10 enjoins upon the Assessor to give the basis of the valuation, and he has no power to make, an assessment without giving the basis on which he makes the valuation. The basis of valuation is to be found, if at all, only in the report submitted by the Assessor to the Commissioners under Rule 10. Where the Assessor made the valuation without stating the basis of valuation in his report under Rule 10, the assessment was in contravention of the Act and the Rules.

Where the procedure enjoined by the Act and the Rules was not followed in making the assessment, the valuation made by the Assessor as also by the Administrator in contravention of the Act and the Rules is *ultra vires*, and in excess of their power and authority.

Where the assessment is *ultra vires* or is made in contravention of the procedure prescribed by the Act and the Rules, the suit challenging the assessment his notwithstanding the provisions of Section 150 of the Act.

The material facts will appear from the Judgment:—

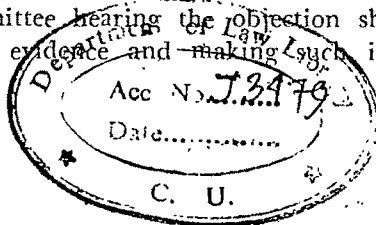
Sudhir Ranjan Banerjee, Bejoy Kumar Mukherjee, Sourendra Nath Mukherjee, R. Surja Kumar with Jogesh Chandra Das—for the *Appellants*.

Soudhendra Kumar Basu—for the *Respondent*.

The Judgment of the Court was as follows:—

**Bachawat, J.:**—The plaintiffs, Tollygunge Club Ltd., holds 250 bighas 12 Cottahs of land with a few buildings and sheds thereon comprised in one holding and bearing the Municipal No. 44, Russa Road, originally the holding was within the Tollygunge Municipality. By a notification of the Government of West Bengal the area where this holding is situated came within the Calcutta Corporation with effect from the 1st of March 1953. There was a quinquennial valuation by the Tollygunge Municipality with effect from the 1st quarter of 1952-53, that is to say from the 1st of April 1952. In connection with this revaluation the Assessor of the Tollygunge Municipality made a valuation of the holding. He assessed the annual value of the holding to be Rs. 90,000/- objection was preferred by the plaintiff against the valuation. The objection was heard and disposed of by the Administrator of the Corporation of Calcutta who reduced the valuation to Rs. 77,500/-. The plaintiff complains that the entire assessment proceedings including the valuation made by the assessor as also the order of the Administrator are illegal and *ultra vires*, and asks for the necessary declaration and consequential injunction. The learned trial Judge dismissed the suit.

I have come to the conclusion that the assessment of the plaintiff's holding is illegal for two reasons and should be declared to be invalid. Section 149 of the Bengal Municipal Act as also rule 13 of the rules framed under the Act requires that the Committee hearing the objection shall pass necessary orders. "After taking such evidence and making such inquiry as it may



deem necessary in the presence of the objection or his agent if he appears." The functions of the committee were at the relevant time discharged by the Administrator for the Corporation of Calcutta. I think that the Administrator contravened the provisions of Section 149 and Rule 13. On the materials before us I am satisfied that the Administrator had before him at the time of the hearing of the objection the report on the assessment put by the Assessor before the Commissioners of the Tollygunge Municipality under Rule 10 of the Rules framed under the Bengal Municipal Act. The report was relevant and material evidence in the matter. The plaintiff assessee was represented by its agent at the hearing of the objection. In spite of requests made by the agent at the time of the hearing the Administrator did not allow the agent to look at and scrutinise the report of the Assessor. It was the duty of Administrator to allow the plaintiff's agent to see whatever materials were on the record which might be used against the assessee and to call such evidence as the Assessee thought fit to rebut those materials. The Requirement of Section 149 and Rule 13 that the Committee shall take evidence and make inquiry in the presence of the objector or his agent is not an empty formality. It is one of the fundamental safeguards imposed by the Act and the rules upon the conduct of the inquiry by the Committee. The Committee as also the Administrator discharging its function is a quasi judicial body. Even apart from section 149 and Rule 13 it was the duty of the Administrator acting quasi judicially to conform to the fundamental principles which are required to be observed in administration of justice in whatever form such justice is administered. One of such fundamental obligations of a quasi judicial body is to allow the party affected to look at and scrutinise the evidence before it so that the party affected may make his representation on the matter and if necessary to call rebutting evidence.

The evidence in this case is somewhat meagre. The plaint is very prolix and obscure. The arguments, advanced in this case at all its stages, also did not help very much in bringing out the real points in issue between the parties. But I think that the charge that the plaintiff's agent was not allowed to look and scrutinise the assessments of the Assessor's report at the time of hearing of the objection has been made out. In paragraph 9 of the plaint it was averred that the Administrator did not let the plaintiff know in the course of the hearing of the objection on what material evidence he had decided to reduce the quantum of the annual value and that he did not let the plaintiff have any opportunity to test the Assessor's opinion, reasons on conclusion departmentally communicated by the Assessor behind the plaintiff's back. In dealing with this charge the defendant avers inter alia that the Administrator was not at all influenced by the report of the Assessor as alleged. The plaint read with the written statement seems to suggest that the report of the Assessor was before the Administrator and that the Administrator was considering the report behind the back of plaintiff. The plea taken by the

defendant in rebuttal is that all these did not matter because the Administrator was not at all influenced by the report of the Assessor. The particular report which the parties had in mind is referred to in item No. 2 of the last of documents mentioned in the plaintiffs application filed in the trial Court on the 7th December 1953. Item No. 2 refers to the report of the assessment put up by the Assessor or before the commissioners of the defunct Tollygunge Municipality for the revaluation period. Interrogatories were delivered by the plaintiff to the defendant under an order of the trial court. Item No. 14 of the interrogatory called up the defendant to admit that at the time of the hearing of the objection the agent of the plaintiff was not allowed to scrutinise the report of the Assessor. The answer to the interrogatory was that the plaintiff's agent was not entitled in law to the scrutiny of the report. It was said that the matter depended purely on the Administrator's discretion, the interrogatory read with the answer clearly suggests that inspite of requests made by the plaintiff's agent at the hearing of the objection the plaintiff's agent was not allowed to scrutinise the report. The point is made clearer by the petition of objection filed on behalf of the defendant. In paragraph 5 of this petition of objection which was filed on the 14th December, 1953, the defendant avers that the agent of the plaintiff was not justified in calling for the report of the Assessor for scrutiny. The facts are admitted. The justification is unsound in law. It is said that there is procedure in the Act which would entitle the plaintiff's agent to scrutinise the report. The right of the plaintiff's to scrutinise the report is implicit in section 149 and Rule 13. The right is also implicit in the fact that the administrator as a quasi judicial body must conform to the fundamental principles of judicial procedure.

The matter may be looked at from another point of view. In the course of argument it was suggested that the report of the Assessor was not really evidence but was itself the subject matter of the review by the Administrator. Assuming that the report of the Assessor itself was the subject matter of the review, it was all the more necessary that the objector should be allowed to read and scrutinise the report. The Administrator, who had before him that report, was under a duty to allow the plaintiff's agent to see that report to make the representation on the materials to be found in that report and if necessary to call rebutting evidence.

It is to be noticed that under orders of court the plaintiff was allowed inspection of the report of the Assessor submitted to the Commissioners under Rule 10. At the time of the inspection, the report was in existence. Curiously, however, neither party tendered the report at the trial of the case. We gave an opportunity to Mr. Bose to produce in this court that report. Mr. Bose stated before us that he had no instruction in the matter. The result is that even in this court we have not got the report of the Assessor which the Administrator had before him at the time of the hearing of the objection.

In the absence of the original report, considering the provisions of Rule 10, I have, no doubt in my mind that the report is a relevant document. The quasi judicial body had before it that report and it does not lie in the mouth of that quasi judicial body to say that it was not influenced by the report.

I think also that the assessment is illegal on another ground. The basis of the valuation made by the Assessor is not known. The basis, if any, could be found only in the report which has not been made available even to us. Rule 10 says that the Assessor shall submit the Assessment list prepared by him with a brief report to the Commissioner showing the basis on which he has prepared the list. It says further that each actual assessment shall be accompanied by a note showing how the Assessor was arrived at it which is by comparing the property in question with other similar property and explaining why the assessment differs if it does. The Rule 10, therefore, enjoins upon the Assessor to give the basis of the valuation. He has no power to make an assessment without giving the basis on which he makes the valuation. The point is whether the report gives the basis. It is common case before us that in this case the Form B referred to in Rule 9 was not given to the assessee and consequently the Assessor had no duty to fill up the last two columns of Form B and to state therein the basis of determination of the annual value. The basis of valuation was to be found, if at all, only in the report submitted by the Assessor to the Commissioners under rule 10. The point therefore is this. Did this report contain the basis of the valuation? As I have already said, the report was not tendered in evidence by either party in the trial court. For that reason we gave an opportunity to Mr. Bose to produce the report before us but he has not, for reasons best known to him, done so. There are materials on record to show that the report did not contain the basis of valuation. The plaintiff stated categorically in paragraph 5 of the plaint that the plaintiff applied for copies of the details of valuation as left by the Assessor in the assessment list of the Administrator of Tollygunge Municipality Annexure "C" to the plaint contains the details of valuation, which the plaintiff was able to obtain from the Municipality. The sheet containing the details of valuation is now exhibit 5. This document was marked as an exhibit without objection. The details of valuation which are to be found in exhibit 5 do not show the basis upon which the Assessor made the valuation of Rs. 90,000. It may be noticed that the statements in paragraph 5 of the plaint are not properly denied in paragraph 6 of the written statement. The matters, however, does not rest here. The plaintiff's Agent repeatedly wrote letters asking for details of valuation. These requests are to be found in exhibit 4, Exhibit A/1, Exhibit A/2, and Exhibit A/4. After receiving these repeated requests from the plaintiff's agent the Administrator by his letter dated 4th of March 1932 exhibit 4(b), wrote to the plaintiff's agent requesting him to send his representative to have the information as required. No written information was supplied. Whatever information the plaintiff's agent gathered is to be found in exhibit 5.

On all these materials I have come to the conclusion that Assessor made the valuation without stating that basis of the valuation in the report submitted by him under Rule 10 as required by law. The charge that the assessment is illegal on this ground is not very clearly made in the plaint. But I think it may be fairly gathered from paragraph 6 of the plaint where it was alleged that the details of valuation were and are incomplete, irregular and illegal and that they did not indicate the method by which the annual valuation was worked out.

In my opinion, therefore, the assessment was illegal both at the state of the original assessment by the Assessor as also at the stage of the hearing of the objection by the Administrator.

It follows therefore that the procedure enjoined by the Bengal Municipal Act and the Rules was not followed in making the assessment and that the valuation made by the Assessor as also by the Administrator in contravention of the Act and the Rules is ultra vires and in excess of their power and authority. In such a case it is well settled that the assessee is entitled to file a suit for declaration that the assessment is illegal. It is true that section 150 of the Bengal Municipal Act provides that no objection shall be taken to any assessment or valuation in any other manner than what is provided in the Act and that no valuation or assessment made under the Act and no order passed under sub-section (4) or sub-section (6) of section 149 shall be called in question in any court. It is well settled, however, that where the assessment is ultra vires or is made in contravention of the procedure prescribed by the Act and the Rules the suit challenging the assessment lies notwithstanding the provisions of section 150 of the Bengal Municipal Act.

The plaint contains a prayer for a decree for refund of excess moneys collected by the defendant. This prayer is not pressed. I, therefore, do not propose to pass any decree for money in this case.

I, therefore, think that the appeal should succeed and that the plaintiff is entitled to the necessary declaration that the impugned assessment is invalid. In passing this order, I however make it clear that it will be open to the defendant to make a fresh assessment of the holding for the period in question in this suit according to law. There was also a prayer for injunction. The impugned assessment was for a period of five years. That period has already expired. In all these circumstances of the case we do not think it fit to grant the prayer for injunction.

I, therefore, pass the following order:—

The appeal be and is hereby allowed. The judgment and decree passed by the trial court be and is hereby set aside. I adjudge and declare that Assessment and valuation of the holding in question for the period of five years with effect from the 1st quarter of 1952-53 be and is hereby declared ultra vires void and not binding upon the plaintiff. It will be open to the defendant to make assessment or reassessment of the holding in question for the aforesaid period of five years in accordance with law.

Each party will pay and bear his or its own costs throughout both in this court as also in the trial court.

**Chatterjee, J.:**—I agree.

*Appeal allowed.*

N. C. S.

#### APPELLATE CIVIL.

*Before the Hon'ble Mr. Justice P. N. Mookerjee and  
Hon'ble Mr. Justice N. K. Sen.*

THE COMMISSIONER OF THE MUNICIPALITY OF Garden Reach & Ors.

Civil  
—  
1960  
}

Vs.

MESSRS. UNION JUTE COMPANY LIMITED.\*

September, 19.

*Bengal Municipal Act, 1932, Section 149(2)—Rules 8, 9, 10, 13, 14, made under Section 215 under Notification No. 5706M dated 10 December 1934—Assessment in contravention of Section 149(2) and Rule 13—Finding of lower appellate court, if may be disputed in sound appeal before High Court—Suit disputing such assessment, if maintainable—Section 150.*

The finding of the lower appellate court upon the materials on record that the disputed assessment was made without complying with and in utter disregard and contravention of Section 149(2) of the Bengal Municipal Act, 1932, and Rule 13 made under Section 215 of the Act, under Notification No. 5706M dated 10 December 1934, was not open to challenge in second appeal before the High Court.

Rules 9 and 10 do not apply to the Review Committee, and Rule 8 does not turn to be strictly obligatory upon it in view of Rule 14.

In regard to a special liability created by a special statute, the remedy, if any provided under the Act, is exclusive.

\* S. A. 571 of 1959.

Accordingly, any infirmity in the Assessors' assessment ought to be rectified by and through the procedure laid down in Sections 148 and 149 of the Act by the Review Committee, and is not, strictly speaking, the matter for consideration in Civil Court.

Where a special tribunal acts contrary to the statute, or in disregard or contravention of or nonconformity with, inter alia, the fundamental principles of judicial procedure, the Civil Court's jurisdiction to declare the special tribunal's act or action ultra vires, and to give appropriate relief to the aggrieved party, is not and cannot be taken away by a mere general provision, like Section 150 of the Bengal Municipal Act, 1932, purporting to oust its jurisdiction.

These two principles are not in conflict with each other. The net result is that the aggrieved party must follow the statutory remedy, but, if the final authority under the statute acts in contravention of the state, or of the statutory Rules thereunder, or of the fundamental principles of judicial procedure, approach the Civil Court is not barred.

The material facts will appear from the judgment:—

Bimala Charan Deb,  
Mahendra Kumar Ghose and  
Poyadhi Nath Ray Chowdhury—for the Appellants.

Sudhir Kumar Banerjee,  
Soumendra Nath Mukherjee,  
Bejoy Kumar Mukherjee,  
Jogesh Chandra Das Gupta with  
R. Surya Kumar—for the Respondents.

The Judgment of the Court was as follows:—

**P. N. Mookerjee, J.:**—A short but important question arises for consideration in this second appeal. The appeal is directed against a decision of the learned Additional District Judge, Alipore, decreeing in appeal, the respondent rate payer's suit for, inter alia, a declaration that a particular assessment is ultra vires of the Bengal Municipal Act and the Rules, framed thereunder and not binding on the plaintiff as for a permanent injunction, restraining the appellant Municipality, which was the defendant in the trial court, from realising any rate under and in pursuance of the said assessment. The suit was dismissed by the trial court, mainly, upon the ground that the particular action, in the facts of this case, was not maintainable in the Civil Court. That dismissal, however, was set aside by the learned Additional District Judge and the plaintiff's suit was decreed by him upon the contrary view, that, in the matter of the impugned assessment, the Municipality had acted in flagrant violation of the statute (Section 149(2) of the Bengal Municipal Act and Rules 8, 9, 10 and 13 under the said Act) and, accordingly the said assessment was ultra vires and could be questioned in the Civil Court in spite of Section 150 of the aforesaid Bengal Municipal Act, against this decision, the present second appeal has been filed by the defendant Municipality.

In the view we are taking, it is not necessary to set out the facts in any great detail. All that is necessary to state is that the disputed assessment (which was in respect of holdings No. 103 and 104 of the Appellant of Garden Reach Municipality, belonging to the respondent Union Jute Company Limited, for the quinquennial period, commencing with April 1956 as eventually made by the Administrator, representing the Review Committee, under the Statute (vide Section 148), affirm in the Assessor's assessment, was upon the finding of the lower appellate court, not open to challenge in the instant second appeal at least, on the materials in record, made without complying with and in utter disregard and contravention of Section 149(2) of the above Act and the connected Rule 13 of the statutory Rules thereunder. That section and the Rule 13) to quote only its relevant part run as follows:

" 149(2) The Committee shall give notice to the applicant of the time and place at which his application will be heard and after taking such evidence and making such inquiry as it may deem necessary, in the presence of the objector or his agent, if he appears pass such orders as it thinks fit and respect of the application.

#### Rule 13 (Relevant part).

On the date, so fixed for hearing, or any date, to which such hearing may be adjourned, the Committee shall take such evidence and make such enquiry as it may deem necessary, in the presence of the objector or his agent, if he appears, and shall then pass such orders on the application as it thinks fit. The point, now is whether the above contravention and non-compliance with the statute and the statutory rule will vitiate the assessment so as to make it ultra vires and open to challenge in Civil Court. We would not refer to the other contraventions, found by the learned Additional District Judge, namely of Rules 8, 9 and 10 as the latter two Rules do not apply to the Review Committee and the former also does not seem to be strictly obligatory upon it in view of the subsequent Rule 14. It is to be remembered also that, in the Civil Court, the Assessor's assessment is not strictly infirmity in it ought to be rectified by and through the procedure, laid down in the Act, that is, by the Review Committee (vide Sections 148 and 149 of the Act). This indeed, is well settled as in regard to a special liability created by a special statute, the remedy, if any provided under the Act, is exclusive (vide *Wolverhampton New Water Works Co. vs. Hawkesford*(1), approved by the House of Lords in *Neville vs. London Express Newspaper Ltd.*(2). This principle, however, is not in conflict with the other fundamental rule or principle, equally well settled that where a special tribunal acts contrary to the statute or in disregard or contravention of or non conformity with, inter alia, fundamental principles of judicial procedure, the Civil Courts jurisdiction to declare the special tribunal's

(1) (1859) 6 C.B.N.S. 336.

(2) (1990) A.C. 338.

Act on action ultra vires and give appropriate relief to the aggrieved party is not and cannot be taken away by a mere general provision, purporting to oust its jurisdiction. This indeed is the effect of the Privy Council case of Secretary of State represented by the *Collector of South Arcot vs. Mask and Company*(1) and that position has not been affected by any subsequent authority. The net result will then be that the aggrieved party must follow the statutory remedy but, if the final authority under the statute acts in contravention of the Act or of statutory rules thereunder or of fundamental principles of judicial procedure, approach to the Civil Court is not barred. The Election case, cited by Mr. Deb and strongly relied on by him, namely *N. P. Pannuswami vs. The Returning Officer Namakkal Constituency*(2), was on the first of the above two well settled rules or principles but, as seen above, and as explained and affirmed by the Privy Council in *Mask's Case*(1), that rule or principle does not militate against the other principle aforesaid, too firmly established to be questioned now, as stated by the Privy Council at P. 236 of the said Report. Indeed, as pointed out by the Privy Council, the two principles are distinct and independent and have their own fields of applications and it is often a most question, within which principle, a particular case falls.

As to *The Commissioners of the Krishnanagore Municipality vs. Kalidhan Chatterjee*(3), it is enough to say that there the present question did not arise and on its facts and findings, the decision may well be supported, we do not deem it necessary to say anything more on this case.

Same remarks apply to Municipal Commissioners of the *Pabna Municipality vs. Naba Govinda Choudhury*(4) and *Hari Bhusan De vs. The Municipal Commissioner of Kamarhati*(5), the basic finding was that there was substantial compliance with the statute (which of course, would include the statutory rules) and that the so-called mark this significant phrase infraction of the rules did not go the root of the matter at all and that sufficiently distinguishes it from the present case.

On the above view, the instant suit would be perfectly maintainable and the impugned assessment must be held to be ultra vires for contravention of section 149(2) of the Act, read with relative Rule 13. and accordingly, the decree of the plaintiffs is suit, as made by the learned Additional District Judge, must stand and must be affirmed.

In the result, this appeal fails and it is dismissed but, in the circumstances, there will be no order for costs either in this court or in any of the two courts below.

N. C. S.

Appeal dismissed.

(1) (1940) 67 I.A. 222,237.  
(3) (1957) 62 C.W.N. 727.  
(5) (1941) 45 C.W.N. 1113.

(2) (1952) S.C.A. 332.  
(4) (1942) 46 C.W.N. 830.

## APPELLATE CIVIL

*Before the Hon'ble Mr. Justice P. B. Mukharji and  
the Hon'ble Mr. Justice Chandra Narayan Laik.*

Civil

1963

PANCHANAN JASH &amp; ORS.

April, 22.

Vs.

## BOARD OF SECONDARY EDUCATION, WEST BENGAL.\*

*Constitution of India, Article 226—Rules made by Calcutta High Court under Notification No. 7586G dated 1 November 1960,—Rules 31, 32—Rule relating to application under nisi issued under Article 226 of Constitution, if may be disposed of, before service or issue, of the same upon Respondents—Consent order made purportedly at the instance of Petitioner and appearing Respondent, if binding on Respondents not served with Rule nisi—Consent order, if liable to be set aside—Proper order in appeal.*

The Rules made by the High Court at Calcutta under Notification No. 7586G dated 1 November 1960 relate to and govern applications made under Article 226 of the Constitution.

A rule nisi in an application under Article 226 of the Constitution marked "Appellate Side" shall be returnable within eight weeks from the date of the making of the order under Rule 31, and shall be put down in the daily hearing list of the appropriate court when the returns of service upon all the Respondents have been received and on expiry of the returnable date according to Rule 32, of the said Rules.

Where a Rule nisi under Article 226 of the Constitution was issued on 25 April 1962, and was returnable by 20 June 1962, and the Petitioner obtained an interim injunction till 1 May 1962, and applied for extension of such injunction on 30 April 1962, and deposited requisites for service of Rule nisi on all Respondents on 30 April 1962, and one of the Respondents somehow appeared on that ex parte application for extension of injunction and contested the same, and at the hearing of such application for extension of injunction on 21 May 1962 a consent order was made purportedly at the instance of the Petitioner and the contesting Respondent disposing of the main Rule to the prejudice of the rights and interests of the unserved Respondents without disposing of the said application for extension of injunction, such consent order cannot be upheld and should be set aside on appeal.

In such circumstances, and in particular when the Petitioner was a Respondent in the appeal, and entered appearance in the appeal through an Advocate who, however, failed to appear at the hearing of the appeal to support the petitioner's case that the petitioner had not given his consent to the said consent order, the proper order to be made in the appeal is to transpose the aggrieved unserved Respondents in the Rule nisi to the category of petitioners, and to transpose the original petitioner to the category of Respondents, and to allow the amended Rules nisi to be heard by the appropriate court.

The material facts will appear from the Judgment:—

N. C. Sen with Naresh Chandra Ganguli—for the Appellant.

\* Appeal from original order No. 358 of 1962.

Smiriti Kumar Ray Choudhury, Prodyat Kumar Banerjee, Profulla Kumar Ray (Jr.), S. A. M. Habibulla—for the Respondents.

The judgment of the Court was as follows:—

**P. B. Mukharji, J.:**—Education, litigation and constitution have combined to produce this splendid procedural confusion. The petitioner was one Parbati Charan Roy, Secretary, Banpesh Siksha Niketan, District Burdwan. There were fourteen respondents to this petition. The first five represent (1) the Board of Secondary Education, (2) the Administrator, Board of Secondary Education, (3) the Secretary Board of Secondary Education (4) the Additional District Inspector of Schools, Burdwan, being Administrator appointed by the Board and (b) the State of West Bengal. They are the real contesting respondents to this petition. The respondents Nos 6 to 14 being President, Vice President and members of the Managing Committee of the Bonpesh Siksha Niketan were only propose respondents to the petition. The Petitioner Parbati moved and obtained a rule from this Court on the 25th April 1962. That rule was made returnable within eight weeks as provided in the Rules of this court that is by 20-6-62 and the petitioner also obtained at that time an interim injunction till 1-5-62. The Rule as obtained by the petitioner, Parbati, was a Rule for mandamus for cancellation or rescission of the impugned order dated the 3rd February 1962, superseding the Managieg Committee of Bompesh Siksha Niketan and appointing the 4th respondent as the Administrator of that Institution and to forbear from giving effect to such impugned order. The rule also asked for a writ of quo warranto questioning the authority of the 4th respondent as Administrator of the Institution.

Now before the Rule was returnable as above the petitioner, Parbati, made an application on the 30th April, 1962 for extension of the period of injunction and he also on that date deposited the requisites for service of the rule on the respondents. An order was made on this application for extension of rule the time for injunction on the 2nd May 1962. That order stated that the hearing of the application for extension of the time of the injunction was adjourned for a fortnight. The Board of Secondary Education somehow or other appeared on that ex parte application for extension of the injunction and agreed to accept the service through the learned Advocate Mr. S. K. Roy Choudhury. In this application an affidavit in opposition was filed by the Board on 7th May, 1962 and an affidavit in reply by the petitioner, Parbati, was filed on 11/16-5-62. This application for extension of injunction came up for hearing on the 21st day of May 1962, when a consent order was made. It is necessary to set out that consent order. The order is set out in full as below:

"It is not necessary for me to dispose of this application separately. The main Rule is disposed of by consent in the following manner.

(a) The main Rule, that is to say, Civil Rule No. 257(W) of 1962, shall stand discharged. The Administrator appointed by the Administrator of the Board of Secondary Education to take over the management of the school shall immediately take over the management and shall arrange for holding a fresh election of the Managing Committee of the School in accordance with the Rules.

(b) Such election must be held and completed by the end of September 1962.

(c) When the election of the new Managing Committee is completed, the Administrator shall hand over the administration of the school of the newly elected Managing Committee. There will be no order as to costs in the Rule.

Now the learned Judge although dealing with the application for interim injunction and the extension of its period did not expressly dispose of that application separately. What the learned Judge did do was to dispose of the main rule by consent as indicated above. But the difficulty is that in disposing of the main rule it was overlooked that all the respondents had not appeared on that application. In particular, the members of the Managing Committee, namely, the proforms respondents Nos. 6 to 14, for whom (to be more accurate respondents 7 to 12). Mr. N. C. Sen now appears were not represented at all and could not give their consent and did not in fact give their consent. The rule was returnable on 20th June 1962. The rule was being really disposed of before time i.e. breach of rules 31 and 32 of the Rules of this Court. In fact we find from the records that the rule had not even been served in these respondents members of the Managing Committee at all. Indeed neither the main rule nor the application for the extension of the period of injunction was served on these proforms respondents one are now the appellants before us. The present appellants before us naturally contend that they knew nothing about it, they knew nothing about the application for injunction, and they knew nothing about the consent order by which the main rule has been disposed of as they had not been served at all with any process of this court nor have they been served with the main rule or with the application for the extension of the period of interim injunction. Yet the consent order does seriously effect the right of the members of the Managing Committee by reason of the order directing the Administrator to immediately take over the management and to hold a fresh election by September 1962. That portion of the consent order obviously infringes the statutory rights of the members of the Managing Committee and cannot be made without either hearing them or

without their consent, but the order appealed against a presently was made without either hearing them or without having their consent. Naturally this consent order dated 1st May 1962 cannot bind present appellants, namely respondents Nos. 6 to 12 in the original petition because they never gave consent nor did they appear to give such consent. It is not a case where the Secretary of a school Committee is making an application on behalf of the members of the Managing Committee of the School because in that event the members of the Managing Committee would not be joined individually and separately including the President and the Vice-President thereof as respondents, even as prefer a respondents to this petition.

The present appellants naturally therefore filed an appeal against that order of the 21st May 1962 affecting their rights in their absence and without their consent. The delay in filing the memorandum of appeal was condemned by the Bench hearing the appeal. An order was also issued on the 27th September, 1962 by the appeal court for staying the election directed by this consent order while this appeal was pending.

On these facts there is as answer to this appeal. Obviously the appellants cannot be bound by consent which they never gave and their rights cannot be disposed of without hearing and giving them a chance to appeal and make their submissions. The appeal must therefore succeed on the ground that the present appellants did not give the consent to the order of the 21st May 1962 and therefore such order by consent cannot bind them.

The question that remains is that consent as mentioned in the order of the 21st May 1962 may bind the petitioner, Parbati and the Board of Secondary Education who were the two parties who only appeared in that consent order. Mr. Sen, learned Advocate for the present appellants has drawn our attention to the correspondence which shows that even the petitioner Parbati, was disputing that fact that whether he at all gave the consent or not but it is not necessary for us to go into the question because we find that petitioner, Parbati, is a respondent to this appeal and has been served and has not chosen to submit before us that he did not give his consent. We must record here that it appears that the former petitioner Parbati not only is a respondent but has also entered appearance in this appeal through a learned Advocate who however has not appeared before me, as therefore, propose to transpose the present appellants as the petitioner in this rule and the original petitioners as respondents to that petition as proposed by Mr. Sen, learned Advocate for the appellants. Both Mr. Sen learned Advocate for the Board of Secondary Education have expressly consented and agreed to this transposition. We also think that in the interest of procedural clarification it is the best course in the circumstances of this case to meet the ends of justice, for in the case the petitioner does not choose to move the rule then the present appellants being only proforma respondents in the original petition may find the ground out under their feet.

For the reasons stated above the appeal is allowed. The order of the 21st May, 1962 is set aside. The appellants are transposed as petitioners to the Rule and the original petitioner, Parbati, is transposed as a respondent to that petitioner. No direct and order that the Rule be modified and corrected accordingly, we do not however make any order at this stage to disturb the present statute quo of the Administrator continuing with the management of the school and will leave that question open to be agitated by the appellants, if they are so advised before the court taking the rule and during the pendency of the Rule on appropriate materials and with notice to all the parties to the petition. It follows of course that as we are setting aside the order of 21st May, 1962, directing the election of the new Committee to be held as proposed there, such election cannot and should not be held until after the disposal of the Rule or order any direction that may be obtained by the parties from the Court dealing with and hearing the rule. The rule should be heard expeditiously and the parties are directed to apply for direction for affidavits from the court taking the rule as soon as possible.

The costs of this appeal will abide the costs in the rule. Hearing fee assessed at three G.ms

**Laik, J.:**—I agree.

Appeal allowed.

N. C. S.

### ORIGINAL CIVIL

*Before the Hon'ble Mr. Justice D. N. Sinha.*

Civil

1961

MARWARI MILLS STORES CO.

**Vs.**

September, 9.

A. K. BANDOPADHYOY & ORS.\*

*Constitution of India, Article 226—Proceedings under—Disputed questions of fact, if possible to decide in—Alternative adequate remedy, existence of, if and to what extent a bar to writs of Mandamus, Certiorari and Prohibition—Application under Article 226 of Constitution, if to be entertained or decided during pendency of appeal from the impugned order before statutory tribunal.*

It is not possible in a proceeding under Article 226 of the Constitution to decide the disputed question of fact as to whether the imported goods were really meant for the purpose for which they were imported or as a cloak for according the ban under Appendix XXXV of the Import Trade (Control) Schedule.

Normally, an application for a writ in the nature of Mandamus will not be if there is an alternative remedy which grants adequate relief. In the case of a writ in the nature of Certiorari or Prohibition the existence of an alternative remedy is by itself no bar to an application under Article 226 of the Constitution, provided certain factors exist e.g. an initial lack of jurisdiction violation of the rule of natural justice, etc. But the Court is not bound to entertain such an application. In neither case is the Court's jurisdiction to entertain an application ousted by the existence of an alternative remedy and in a suitable case such an application may be entertained. For example where there are facts which obtrude themselves into the view of the Court requiring relief, the Court will not refuse to entertain the application.

\*-Matter No. 281 of 1960.

Where, however an appeal lies, and such an appeal has been filed and the appellant is proceeding with the appeal which is pending, and at the same time the appellant has preferred an application under Article 226 of the Constitution he is not entitled to make such an application, unless there are special facts in the case which make it desirable that such a application should be decided while parallel proceedings are pending before the statutory tribunal.

The material facts will appear from the judgment:—

P. P. Ginwalla—*Counsel for the Petitioner.*

G. P. Kar—*Counsel for the Opposite Parties.*

The judgment of the Court was as follows:—

**D. N. Sinha, J.:**—The petitioner firm carries on business in the importation of diverse Mill Stores and Accessories. On or about the 19th December, 1958 and 31st December, 1958 respectively the petitioner was granted two Import License by the Joint Chief Controller of Exports and Imports, Calcutta. By the said licences, the petitioner was authorised to import spare parts of jute mill machinery as per lists attached thereto, under S.L. No. 37(2) of part II of the Import Trade (Control) Schedule, valid from October, 1958 to March, 1959. The petitioner was thereby authorised to import spares, components and parts of jute mill machinery falling under S.L. No. 37(2) but excluding components for machinery including in Appendix XXXV of the said Schedule, and Sl. 68 in part 7. In September, 1960 the petitioner imported certain cork cover for jute mill machinery Ex. SS. Alwaki from Germany. According to the petitioner, the goods imported were covered by the licences, as they were intended for Roll Former—Machines used in Jute Mills, and as such came under the heading of component parts of jute mill machinery. The Roll Former Machines were not excluded by the Schedules, not coming within any item mentioned in Appendix XXXV of the said Schedule or Sl. No. 68 in part V. On the 5th September 1960, the petitioner received a notice from the Assistant Collector of Customs for Appraisement, Calcutta, a copy whereof is Exhibit "C" to the petition. It was stated in the notice that on examination of the documents relating to Cork Covers for Jute Mill Machinery imported by the petitioner Ex. SS. "Alwaki," from Germany, it was found that the goods could be used in machines banned under Appendix XXXV. Thus, they were not covered by any Import Licence and the importation was in—contravention of the law. The petitioner was called upon to show cause why the goods should not be confiscated and action taken against them under section 167(8) of the Sea Customs Act, read with section 3(2) of the Import and Export (Control) Act. The petitioner thereupon showed

cause. On the 26th September, the Collector of Customs for Appraisement made an order, a copy whereof is Exhibit "E" to the petition. It was held that the Cork Covers which were imported were for the purpose of being used in the banned type of machineries, as by slight cutting or adjustment they could be used in the banned type of machines. The goods were accordingly confiscated under section 167(8) of the Sea Customs Act, but the petitioner was given an option under section 183 of the Sea Customs Act to clear the same on payment of a fine of Rs. 18,520/-. Against the said order, the petitioner has actually preferred an appeal before the Central Board of Revenue under the Sea Customs Act, but that appeal is still pending. Nevertheless, this application has been made for the issue of a writ in the nature of certiorari quashing the said order and also for a writ in the nature of mandamus directing the respondents not to give effect to the same. As appears from the affidavit in opposition affirmed by Sudhir Chandra Ghosh, on the 8th March, 1961 these Cork Covers were imported, as being required to be used in machines called Roll Formers. It is further stated that they were imported so that with slight modifications they could be used as roller covers for push bar drawing frames and spiral roving frames, being Jute Mill Machineries banned under Appendix XXXV, and were being actually used as such. It is alleged that if this kind of thing is permitted, then the whole prohibition or ban under Appendix XXXV would be defeated. I find also as mentioned in the order dated 18th October, 1960 that there was a personal hearing and the stand taken by the petitioner was that the Customs Department should go by the goods as they were imported and not by their subsequent use in any other form. I do not see how it is possible for me to decide this disputed question of fact namely as to whether these goods were really meant for the purpose for which they were imported, or as a cloak for avoiding the ban. However, what is said is that the Custom Authorities have acted without any evidence and it now appears from the affidavit that they had made enquiries from the mills which enquiries were not done in the presence of the petitioner. Mr Kar has taken a preliminary objection in this case, namely, that there is an alternative remedy by way of an appeal to the Central Board of Revenue, and in fact the petitioner has filed an appeal which is still pending. Therefore, this application does not lie and is misconceived. Mr. Ginwalla admits that an appeal has been filed and it is still pending. His client intends to proceed with the appeal. Nevertheless, he argues that this application is competent. He says that in the appeal preferred, his client has taken certain points, namely corruption on behalf of the stuff, which matter could not be decided by this Court and further, if his client did not prefer the appeal it would have been barred by limitation by the time this application came to be heard and disposed of. In my opinion, none of these grounds are adequate, and the preliminary objection should be made between two propositions. Normally, an application for a writ in the nature of mandamus will not lie if there is an alternative remedy which grants adequate relief. In the case

of a writ of certiorari or prohibition, the existence of an alternative remedy is by itself no bar to an application in this jurisdiction, provided certain factors exist e.g. an initial lack of jurisdiction, violation of the rules of natural justice etc. But the Court is not bound to entertain such an application. In neither case is the Court's jurisdiction to entertain an application ousted by the existence of an alternative remedy, and in a suitable case such an application may be entertained. For example where there are facts which obtrude themselves into the view of the Court, requiring relief, the Court will not refuse to entertain the application.

In *State of Uttar Pradesh vs. Md. Nooh*(1), Das, C.J. said follows:—

“In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute. The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the Superior Court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of interior Courts subordinate to it and ordinarily the Superior Court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies. . . . It has also been held that a litigant who has lost his right of appeal or has failed to perfect an appeal by no fault of his own may in a proper case obtain a review by certiorari. . . . Where the error, irregularity or illegality touching jurisdiction or procedure committed by an inferior Court or tribunal of first instance is so patent and loudly obtrusive that it leaves on its decision an indelible stamp of infirmity or vice which cannot be obliterated or cured on appeal or revision. If an interior Court or tribunal of first instance acts wholly without jurisdiction or patently in excess of jurisdiction or manifestly conducts the proceedings before it in a manner which is contrary to the rules of natural justice and all accepted rules of procedure and which offends the superior court's sense of fair play the superior court may, we think, quite properly exercise its power to issue the prerogative writ of certiorari to correct the error of the court or tribunal of first instance, even if an appeal to another inferior court or tribunal was available and recourse was not had to it or if recourse was had to it, it confirmed what ex facie was a nullity for reasons aforementioned”

But what happens in a case where an appeal lies and such an appeal has been filed and the appellant is proceeding with the appeal and at the same time has preferred an application in this jurisdiction? In my opinion, the law applicable to such cases has now been firmly established. The first case to be cited is a Full Bench decision of this Court, to which I was also a party, *Abanindra Kumar Maity & anr. vs. A. K. Majumdar*(1). In that case Chakravartti, C.J. said as follows:—

“In our opinion, the position taken up by the petitioners is utterly untenable. It has been held by this Court more than once that although the existence of an alternative remedy is not an absolute bar to the entertainment or maintenance of an application under Article 226 of the constitution, still, if a party had availed himself of the alternative remedy, he could not after having exhausted those remedies or gone a certain way in their pursuit, switch round to Article 226 of the constitution and start afresh line of proceeding under that provision.”

I now come to a Superior Court decision *K. S. Rashid & Sons vs. Income tax Investigation Commissioner & ors.*(2). In this case Mahajan, C.J. said as follows:—

“We think that it is not necessary for us to express any final opinion in this case as to whether section 8(5) of the Act is to be regarded as providing the only remedy available to the aggrieved party and that it excludes altogether the remedy provided for under Article 226 of the constitution.

For purposes of this case it is enough to state that the remedy provided for in Article 226 of the constitution is a discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. So far as the present case is concerned, it has been brought to our notice that the appellants before us have already availed themselves of the remedy provided for in section 8(5) of Investigation Commission Act and that a reference has been made to the High Court of Allahabad in terms of that provision which is availing decision. In these circumstances, we think that it would not be proper to allow the appellants to invoke the discretionary jurisdiction under Article 226 of the constitution at the present stage, and on this ground alone we would refuse to interfere with the orders made by the High Court.”

It will be remembered that this is matter under the Sea Customs Act. In a case under the same Act—*Radha Kisen vs. E. Rajaram Rao*(3), Chakravartti, C.J. said as follows:—

(1) A.I.R. (1956) Calcutta 273.  
(3) A.I.R. (1955) Calcutta 241.

(2) A.I.R. (1954) S.C. 207.

" . . . . . the appeal must fail on two technical grounds. I shall take the simpler of them first. It appears that before this court had been moved for a writ under Art. 226 of the constitution, the appellants had already preferred an appeal under section 188, Sea Customs Act and that appeal was then and is still pending. It is quite true that when there is an alternative remedy, the mere existence of such remedy is not an absolute bar to the entertainment of an application under Art. 226, but for different is the case when the party moving the court under Art. 226 has already availed himself of the alternative remedy and whether or not he is entitled to any relief in that chain has not yet been decided. I am clearly of opinion that having preferred an appeal from the impugned orders under section 188, Sea Customs Act, the appellants could not be allowed to move this Court under Art. 226 and that at a time when their appeal was still pending and undecided. The present application was not, therefore, maintainable."

The Appeal Court judgment is fully binding on me. Mr. Ginwalla appearing on behalf of the petitioner has cited a number of cases to the effect that the bar against coming to this Court, where there is an alternative remedy, is not an absolute bar. He has cited the case of *The State of Uttar Pradesh vs. Md. Nooh*(1). He has also cited a decision of Bose, J. (as he then was)—*Messrs. Bharat Board Mills Ltd. vs. R. P. Fund Commissioner*(2). In that case, the learned Judge stated that he did not propose to go into a detailed discussion of the cases on the question as to whether the adoption of a number of remedies as prescribed in the Public Demands Recovery Act precluded the petitioner from invoking the jurisdiction of this Court under Art. 226 of the constitution, as different views on the point, and no hard and fast rule could be laid down as to when a party should be forced to have recourse to an alternative remedy and when not. The learned Judge held on the merits of that case that the petitioner was not entitled to any remedy. This decision does not deal with the question as to the legal position when a person has an alternative legal remedy and is actually following the same. In my opinion, the legal position has been well established by the decisions cited above, and must be held against the petitioner. While it is deliberately pursuing the alternative remedy provided for in the Sea Customs Act, it is not entitled to make an application under Art. 226 of the constitution. There are no special facts in this case which make it desirable that this application should be decided while parallel proceedings are pending before a tribunal constituted under the Sea Customs Act. Therefore, on this preliminary point, this application should fail.

The result is that this application fails. The Rule is discharged. Interim orders, if any, are vacated. There will be no order as to costs. I must make it clear that I have not gone into the merits of the case.

Rule discharged.

N. C. S.

(1) AIR, (1958) S.C. 86.

(2) A.I.R. (1957) Calcutta 702.

## APPEAL FROM ORIGINAL CIVIL

*Before the Hon'ble Chief Justice and the Hon'ble  
Mr. Justice Debabrata Mookerjee.*

Civil

1962

ASOKE CHANDRA BANERJEE.

Vs.

B. N. SEN &amp; ORS.

March, 1962.

*Bengal Excise Act, 1909 (Bengal Act V of 1909)—Section 8—Scope of—Section 37 and Rule 58 under Notification No. 595 S.R. dated 30 March 1915—Scope of—Sections 30 to 35—Scope of—Renewal of license—Section 44A and Rule 67(b) under Notification No. 595 S.R. dated 30 March 1915—Scope of—Intention, if relevant—Grant or renewal, if subject to decision of higher authorities—*

Powers of appeal and revision of the widest amplitude are given by Section 8 of the Bengal Excise Act, 1909, and the Rules made thereunder provide for appeals from orders made under the Act, and name the authorities by which the appeals have to be decided. Section 8(3) gives power to the State Government to revise any order passed by the Collector, the Excise Commissioner, the Commissioner of a Division, or by any officer exercising the power of an appellate authority under the Rules framed under Section 85 of the Act. Thus very wide powers are reserved to the State Government enabling it to revise orders passed under the Act at different levels.

Rule 58 under Notification No. 595 S.R. dated 30 March 1915, limits the period of a license for sale of intoxicants, wholesale or retail under the Act to one year from 1st April to 31st March, or for any shorter period within the year, subject to certain provisions contained in the Rule. In no case, can a license extend in one instalment for a period of more than 12 months. This Rule has, however, no application when the grant of license is for a period of 6 months, in view of section 37 of the Act.

Section 30 to 35 of the Act relate to licenses for retail sale of spirit consumption of the vendor's premises. Section 30 is the primary section, and the other following sections must be referred to it.

An "off" shop license authorises its holder to sell spirit from the shop which may not be used as a place for consumption of the same, as such, the provisions of chapter VI of the Act have no direct application to such license.

The Bengal Excise Act, 1909, contains no express provision for renewal of license. Under section 44A of the Act, there is no right in the licensee to claim renewal, but it does not prevent the authority competent to grant licenses from renewing the same. This view is supported by Rule 67(b) under Notification No. 595 S.R. dated 30, March 1915.

The intention of the authority concerned is a relevant consideration for the purpose of determining whether a license is a fresh grant or a mere renewal. If the intention to renew can be gathered from the circumstances of the case, such intention cannot be ignored. Where the renewal was a contention of the original permit, and the original fell the renewal too wants fall. There may be an implied condition that the renewal is given subject to the decision of pending appeals or proceedings.

A grant or renewal of a license under the Act is always subject to the decision of the higher statutory authorities.

The Bengal Excise Act 1909, is not a statute in pari materia with the Motor Vehicles Act, 1939.

The material facts will appear from the Judgment:—

The Judgment of the Court was as follows:—

(1) (1957) S.C.A. 404

\* Appeal from original civil No. 26/1962.

**Debabrata Mookerjee, J.:**—This appeal is brought from a decision of Banerjee, J. discharging a Rule for certiorari in respect of certain proceedings and orders under the Bengal Excise Act (Act V of 1909).

Pursuant to a notification issued by the Additional District Magistrate of Burdwan on December 29, 1959 the appellant applied for a license to run a country spirit shop for retail sale of spirit to members of the public for consumption off the shop at a place called Bhiringhee within police station Faridpur in the district of Burdwan. The notification stated that the opening of such shop had lately been sanctioned by the Government and the shop would be settled on the fixed fee system for the remaining months of the current financial year ending on March 31, 1960. It added that there was prospect of renewal of the license upon proved good conduct of the licensee.

There were a number of applicants for appointment as licensee and the Superintendent of Excise after having interviewed them recommended three persons as suitable for appointment as licensee of the shop. The appellant Asoke Chandra Banerjee and the respondent No. 7, Bibhuti Bhusan Nag were among the recommended persons. The Superintendent of Excise further reported that in view of the great demand for country spirit shop at Bhiringhee, it was advisable to defer enquiries into the antecedents of the candidate who may finally be selected so that the shop may at once be settled provisionally for a period of two months for the present.

On receipt of this report, the Additional District Magistrate of Burdwan selected the appellant as the person most suitable for appointment as licensee and subject to the Collector's approval he settled the shop with the appellant for a period of two months "on a provisional basis pending usual enquiries." This was done by an order dated April, 25, 1960, which was approved by the Collector by an order of even date. The appellant was informed of the order and told that the settlement had been made subject to results of appeal, if any, and was directed to select a site for the shop and open it within a week. The site was selected within a few days and he was authorised by the collector to sell country spirit on and from May 9, 1960. This order was made subject to the usual enquiries. On the 8th of July the license was extended on the same terms and conditions as before until further orders or until August 8, 1960, whichever date was earlier. On August 8, 1960, the license thus provisionally issued was confirmed with effect from the 6th August and was extended till the end of the current financial year, that is to say, the 31st of March, 1961. Meanwhile, the settlement of the shop with the appellant had been questioned in a appeal by several of the disappointed applicants. These appeals were disposed of by the Commission of Excise on the 2nd August 1960 by which the previous order made by the Collector on April, 26 1960 was affirmed. Dissatisfied with this

appellate decision, the respondent No. 7, as well as others applied for revision of the appellate order and during the pendency of the revision petition before the State Government, the license in favour of the appellant was renewed "provisionally" for the period of 1962 "pending disposal of certain miscellaneous cases."

The revision petition was dealt with by the Minister-in-charge of the Department and upon his report dated July 24, 1961, the Governor was pleased on August 1, 1961, to revise the decision of the Commissioner of Excise dated the 2nd of August 1960, and to direct settlement of shop with the respondent No. 7, Bibhuti Bhusan Nag. This order made by the State Government was communicated on August 14, 1961, to the appellant and he was directed to make over charge of the shop to respondent No. 7, within seven days from that date. There were other directions relating to the sale of the unsold balance of the stock of country spirit to the said respondent upon his paying the duty and proportionate license fees.

The appellant then applied to this Court under Article 226 of the constitution and obtained a Rule for certiorari requiring the respondents to show cause why the proceedings and orders complained of and made on August 1st and August 14, 1961, should not be brought up and quashed.

The Rule Nisi came to be disposed of by Banerjee, J. who upon hearing the parties discharged the rule upholding the order of the State Government revision the previous orders of the Collector and of the Commissioner of Excise to which we have referred.

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The proceedings were contested before the learned Judge by the said respondent No. 7 as well as by the State of West Bengal mainly on the ground that the impugned orders were valid and legal and could not be attached on the ground of breach of any of the provisions of the law.

In the Writ application it was sought to be established that the last order of settlement dated April 7, 1961, made in favour of the appellant could not be treated on the footing of a provisional license and the order of settlement made on the last mentioned date was not included within the scope of the revision petition and consequently any order made by the State Government in exercise of their revisional powers could not affect the license which had been issued to the appellant for the year 1961-62. The principal point on behalf of the appellant therefore was that the order of the State Government passed in the exercise of revisional powers could have no effect on the order of April 17, 1961 on which date the license was issued in the appellants' favour for the year 1961-62 and this order of settlement could not, if any sense, be linked up with the

previous orders made on April 25, 1960 or on July 9, 1960 or even on August 8, 1960. The contention was that the order of settlement made on April 7, 1961, was an independent order which remained unaffected by the decision of the Government to set aside the previous orders made in the appellant's favour on April 26, 1960, and August 2, 1960. On behalf of the respondents, a contrary contention was put forward that the order of April 7, 1961, was nothing more than a mere continuation of the previous orders settling the shop with the appellant.

Upon a consideration of the rival contentions, the learned trial Judge came to the conclusion that all orders of settlement subsequent to the first were in reality renewals of the license granted in favour of the appellant and if the original grant dated April 26, 1960, was set aside by the State Government exercise of their revisional powers, all orders made in the appellant's favour subsequent to the first order of the 26th, stood automatically vacated. In other words, if the order issuing license in the appellant's favour on the 26th of April 1960 was liable to be set aside, then all orders subsequently made extending the period of the license from time to time including the one made on the 7th of April 1961 were also liable to be set aside. In reaching this conclusion, the learned Judge relied on a decision of the Supreme Court reported in *(V. C. K. Bus Service Ltd. V. The Regional Transport Authority, Combarators)*(1). The learned Judge also expressed the view that the so called provisional license issued from time to time in favour of the appellant appeared to him to be not warranted by the provisions of the Act.

Being dissatisfied with the decision of learned trial Judge, the appellant has brought this appeal in which the main contention has been that the order of the 7th April 1961 has remained unaffected by the result of the revision petition with the consequence that the order made by the District authorities requiring him to surrender the license and deliver the unsold stock to the respondent No. 7 cannot be justified.

In order to be able to appreciate the contention it is necessary to recall some the provisions of the Bengal Excise Act. It is unnecessary to refer to the definition section since it is nobody's case that country spirit is not an exercisable article or an intoxicant can be sold except authority and subject to the terms and conditions of license granted in that behalf of by the Collector. Chapter VI of the Act deals with Licenses, permits and passes and section 86 gives power to the State Government to make rules to implement the provisions of the Act. Chapter II contains provisions relating to Establishments, Central, Appeal and Revision. Section 8 occurs in this Chapter and sub-sections (2) and (3) that section require to be noticed. They are these words:—

(1) (1957) S.C.A. 404.

"(2) Orders passed under this Act or under any rule made hereunder shall be appealable in such cases, to such authorities and under such procedure as may be prescribed by rule made under Section 85, clause(c).

(3) The State Government may revise any order passed by the Collector, the Excise Commissioner or the Commissioner of a Division or by any officer exercising the power of an appellate authority under any rule made under section 85 clause (c).

It is plain that powers of appeal as well as of revision of the widest amplitude are given by this section and the relative provisions contained in the Rule provide for appeals from orders made under the Act and names the authorities by which the appeals have to be decided. Sub-section (3) gives power to the State Government to revise any order passed by the Collector, the Excise Commissioner or the Commissioner of a Division or by any officer exercising the power of an appellate authority under the Rules framed under Section 85. Thus very wide powers are reserved to the State Government enabling them to revise orders passed under the Act at different levels.

Before we proceed to consider the other provisions it is necessary to recall that by Rule 58 the period of license for the sale of intoxicants has been limited. That Rule says that licenses for the Wholesale or retail sale of intoxicants may be granted for one year, from the 1st April to the 31st March or for any shorter period within the year subject to certain provisions contained in that Rule. It is not necessary for our purpose to refer to other provisions. It is plain that in no case can a license extend in one instalment for a period of more than twelve months. As we have said, Chapter VI deals with Licenses, Permits and passes, Section 37 which occurs in that Chapter says that none of the preceding provisions in the Chapter (Sections 3 or 36) will apply "to any person for the retail sale of any intoxicant during any period not exceeding six months." It is plain therefore that whatever provisions there might exist for regulating the grant of license for a period of twelve months at one time, those rules do not apply if the license is for a period of six months or a shorter period.

Section 30 provides for preparation of the list of places for which it is proposed to grant licenses for the retail sale of spirit and section 31 enjoins publication of that list. Section 32 read with the rules provides for the time within which the list is to be prepared and published. Section 33 provides for submission of objections and opinions to a named authority follows section 34 which says that after the date prescribed for the receipt of objections and opinions, the collector shall consider the same and shall in necessary revise the list and shall decide for what places license for the retail sale of spirit shall be granted and may in his discretion grant licenses accordingly. The

rest of the section is not material to our purpose. Section 35 final the decision reached by the Excise Commissioner in the matter of grant of license. Section 35 says that the Excise Commissioner shall consider the list, objections and opinions sent to him, and may modify or annual any order passed or license granted by the Collector.

The provisions which we have read relate to license proposed to be given for the retail sale of spirit for consumption on the Vendor's premises. It appears to us that section 30 is a primary section and the others that follow must be referred to it and hold to relate to the issue of license where country spirit is intended to be consumed on the vendor's premises. It is to here called that in the present case the advertisement which the appellant answered and the license actually issued and renewed was, what is termed, an "off shop" license, that is to say, a license authorising the holder to sell country spirit from the shop which may not be used as a place for consumption of the same. That being so, it cannot be said that the provisions contained in Chapter VI have any direct relevance in the present case.

On behalf of the appellant, it has been strenuously argued that an examination of the provisions contained in Chapter VI shows that in each case before the issue of a license the requisites of preparation of the list of places for which it is proposed to grant licenses for the retail sale of spirit, the publication the list retail submission of objections to the appropriate authority, are requisites which can never be dispensed with. The procedure requires to be gone through in every case before a license can properly be granted. This aspect of the matter has been emphasised only with a view to showing that the order of April 17, 1961, is an independent grant and is not refundable to any of the previous orders passed by the appropriate authority in favour of the appellant. The argument is that it is not a continuation of the original grant and that the provisions to which we have referred clearly indicate that the legislature never contemplated that there should be such a thing as renewal of a license. Reliance has been placed upon section 44A which was introduced by the amending Act of 1914 to show that there is no such thing as renewal of license for sale of country spirit. That section says:—

"No person to whom a license has been granted under this Act shall have any claim to the renewal of such license, or, save as provided in section 43, any claim to compensation on the determination thereof."

It has been said that this section forbids the idea of renewal and says that an applicant can never claim renewal of the license which has been issued to him. The argument is that if a licensee is not encouraged to hope that his license may be renewed and if there is no express provision in the statute itself authorising renewal it would be circumventing the law if by the use of

the expression "license renewal" the order of the 7th of April 1961 is attempted to be linked up with the original grant of license made on the 26th April 1960, Section 44A has been characterised as being no more than a mere oblique or indirect reference to renewal in the context of a denial of claim of compensation except as provided by section 43 of the Act. That being the position, it would be, it has been said, not right to hold that the order of the 7th April, 1961 could in any way be said to have been affected by the State Government by revising the previous orders of the collector and the Commissioner dated the 26th April 1960 and the 2nd of August 1960.

It must at once be said that there is no express provision in the Bengal Excise Act authorising renewal of licenses. Indeed, section 44A, properly looked at, means and implies that a licensee cannot lay claim to renewal of his license. But does that necessarily mean that the licensing authority is deprived of its discretion to renew a license in a proper case? There may not be a right in the licensee to claim renewal but that does not imply that the authority competent to give license is not entitled to use its discretion in favour of the grantee and renew the license. It is true that the provisions of the Excise Act, at any rate such of them as have been placed before us, do not expressly authorise renewal of license. In that respect, it must be said that the Bengal Excise Act is different from the Motor Vehicles Act. Section 56 of the Indian Motor Vehicles Act provides as follows:—

"58(1) (a) As stage carriage permit or a contract carriage permit other than a temporary permit issued under Section 62 shall be effective without renewal for such period, not less than three years and not more than five years, as the Regional Transport Authority may specify in the permit.

(b) A private carrier's permit or a public carrier's permit other than a temporary permit issued under Section 62 shall be effective without renewal for a period of five years.

(2) A permit may be renewed on an application made and disposed of as if it were an application for a permit.

Provided that the application for the renewal of a permit shall be made,—

(a) In the case of a stage carriage permit or a public carrier's permit, not less than sixty days before the date of its expiry and

(b) In any other case, not less than thirty days before the date of its expiry;

Provided further that, other conditions being equal, an application for renewal shall be given preference over new applications or permits.

(3) Notwithstanding anything contained in the proviso to sub-section (2), the Regional Transport Authority may entertain an application for the renewal of a permit after the last date specified in the said proviso for the making of such an application if the application is made not more than fifteen days after the said last date and is accompanied by the prescribed fee.'

These are express provisions relating to renewal. To this extent the appellant's contention is correct that the Bengal Excise Act is not an Act which can be said to be *Pari Materia* with the Motor Vehicles Act. But does this circumstances disentitle the licensing authority from renewing a license in favour of a grantee whose conduct it finds to be satisfactory on proved good however? Just as there is no express provision in the Bengal Excise Act authorising renewal of license, there is nothing in that which takes away from the power of the licensing authority to renew a license in an appropriate case.

On behalf of the State, it was contended that chapter VI, dealing with licenses, permit and passes, not relate to grant to what is called "of license", that is to say, license for the sale of country spirit for consumption of the vendor's shop, but they apply only to "on licenses", that is to say licenses for sale or retail spirit for consumption on the vendor's premises. On our invitation, learned Counsel for the State drew attention to some of the provisions contained in the Rule framed under section 85 of the Act. The Rules relate to licensing Boards which are charged with the duty of exercising functions analogous to those of Collectors in chapter VI of the Act. It is unnecessary to refer to these provisions except for the purpose of stating that several of them refer to "existing licenses" while a number of others refer to "new licenses". The contention is that provision has been made for continuance of existing shop states and of continuing existing licenses if a license in respect of a shop exists and is continued, that means and implies that the license is renewal. This contention on behalf of the state is sought to be strengthened by reference to Rule 67(b) which says that "licenses for the retail sale of any intoxicant shall not ordinarily be granted to former licensees who are in arrears to Government or whose conduct has been found to be unsatisfactory or who have been found guilty of any serious breach of conditions of their licenses. The argument has been that these are provisions which would clearly indicate that there is nothing in the Act or in the Rules which would prevent the renewal of licenses. We think this is an argument which is supported on the text of the statute as well as of the Rules. We have found nothing in either of them to discourage the view that a license can be renewed although it is true there is no express provisions authorising such renewal.

The chief contention on behalf of the appellated has been, as we have noticed that the license issued on the 7th of April 1961 for the period 1961-62 is an independent grant which was not the subject matter of the revision. An examination of the primary document, which is the license in this case, makes plain the position that none of the grants was intended to be final. The first grant was made on the 9th of May 1960 which authorised the appellant to sell on retail basis country spirit on and from the 9th of May till the 9th of July 1960. This authorisation was expressly stated to be provisional and made subject to what were called, "usual enquiries." The license was then "extended" on the 8th of July on the same terms and conditions until further orders or until the 8th of August 1960 whichever was earlier. On the 8th of August again the license which was stated to have been provisionally issued was confirmed with effect from the 6th of August 1960 and extended till the end of the current financial year. On the 7th of April it was again "renewed provisionally" for 1961-62 "pending disposal of miscellaneous cases." Thus, textually, in form, as well as in content, the several endorsements which we have just read would show that none of them was an independent grant. The word, "renewed" or "Extended" appears to have been employed on each occasion except the first, and there can, in our view, be no doubt that the question of license in this case was treated throughout on a tentative basis. There can be no doubt that the real intention was to extend the duration or prolong the life of the original license issued on the 9th of May 1960.

If such is the position, we have to see whether there is authority for the view that a renewed license is liable to fall when the original license stands cancelled. This question was considered at length by the Supreme Court in the case of *V. C. K. Bus Service Ltd. V. The Regional Transport Authority*(1) from several aspects. The facts of that case briefly were that T. T. Co. Ltd. and V. C. K. Bus service were granted licensee by the Regional Transport Authority on December 3, 1952, on appeal to the Central Road Traffic Board, the order granting these licenses were set aside the new licenses were directed to issue in favour of Stanes Transport Ltd. and T. Gounder. This was done on February 19, 1953. A revision were then taken under section 64A of the Motor Vehicle Act. The State Government confirmed the grant of permit to Stanes Transports Ltd. but set aside the grant in favour of T. Gounder and gave a license to Annamalai Bus Transport Ltd. This was done on the 9th of July 1953. The appellant in that case well as others than applied to the Madras High Court under Article 226 for appear private write to quash the orders of the Central Road Traffic Board as well as of the State Government. The High Court declined to interfere by an order dated March 8, 1954. Appeals were taken against this order but the writ appeals were dismissed March 21, 1956. Meanwhile under an order of stay granted by the High Court, the original grantees of license continued to run their

(1) (1957) S.C.A. 404.

buses. The permits expired in June 1954. There was an application made for renewal for three years by the appellant. On the 5th September 1954, the Regional Transport Authority granted a permit to the appellant for a one year in the expectation that the writ appeals would by then have been decided. On the 23rd June 1955, the Regional Transport Authority again renewed the permit to the appellant for a period of three years ending the 30th of June 1958. Thereafter, on the 21st of March 1956, the writ appeals to which we have referred were dismissed. Apprehending that in view of the decision in the writ appeals, the Regional Transport Authority might cancel the permit, the appellant Transport Authority from cancelling the permit issued on the 23rd of June 1955. The Madras High Court held that when the original permit was set aside the renewal was liable to fall. There was writ appeal against this decision but the appeal was dismissed. A certificate, however, was given under Article 133(i) (c) of the constitution but after the disposal of the appeal *stane* Transports Ltd. and Annamalai Bus Transport Ltd. applied to the Regional Transport Authority who on the 5th May 1956 cancelled the permit in favour of the appellant and granted permits to the applicants. A writ petition was then filed by the appellant against this order of the Regional Transport Authority but it was again dismissed but leave to appeal was given under Article 133 of the constitution. Thus, these two matters came to be heard together by the Supreme Court.

Several questions were raised in that appeal one of which was whether a renewal was in the nature of a fresh grant or whether it was merely a continuation of the previous permit which must at least be taken subject to an implied term that it should cease if the original permit was cancelled. It was contended before the Supreme Court that renewals under Motor Vehicles Act were merely renewals in name but in substance they were always fresh grants which were required to be made after public hearing and after calling for representation against the proposed grant. Another feature stressed was that there might be new conditions imposed when a permit is renewed. These contentions were negatived by the Supreme Court on reference to the different provisions of the Motor Vehicles Act and the Rules. It was held that renewal was continuation of the original permit.

The decision of the Supreme Court was, in our view not rested solely upon the provisions of the Motor Vehicles Act and the Rules. The Learned Judges who dealt with the matter made certain observations which we think were of a general nature quite applicable to the facts to the present case. We consider these observations to be binding upon us and they appear to govern the approach of the question involved for decision in the appeal before us. For example, it was held that the intention of the authority concerned was a relevant consideration for the purpose of determining whether a license is a fresh grant or a mere renewal. If the intention to renew can be gathered

from the circumstances of a given case, then such intention cannot be ignored. Indeed, the decision in the case was rested on two grounds. First it was found that there was renewal of the license which was in the case a continuation of the original permits and when the original fell, the renewed too was bound to fall. Second, there was an implied condition that the renewal was given subject to the decision of the appeal then pending. It will be recalled that the license in the case before the Supreme Court was renewed by the Regional Transport Authority on the 23rd on June 1955. At that time the writ appeals were still pending before the Madras High Court. The Supreme Court held that when the renewal was made, such renewal must be taken to have been made on the implied condition that it would be subject to the decision of the appeals then pending.

It was ruled by the Supreme Court that grant of license of its renewal would always be subject to the decision of higher authorities. Referring to the grant and the renewal of licenses in that case, it was observed that when the permit was granted on the 3rd December 1952 in the appellant's favour, it was subject to the decision of the statutory authorities. When the license was renewed on the 5th September 1954, it was again subject to the decision of the appeal then pending, when the renewed permit was again renewed on June 23, 1955, the decision to renew was subject to the decision of the writ appeal. In the case before us, it is to be recalled that after the license had been extended on August 8, 1960, a revision petition was filed by respondent No. 7 and a number of other persons on September 5, 1960. That revision petition was not disposed of until the 24th of July 1961; but the renewal made on the 7th April 1961 which is claimed on behalf of the appellant to be a fresh grant was made during the pendency of the revision petition. Applying the test laid down by the Supreme Court, we think that we are bound to hold that when the license was renewed or issued on April 7, 1961. It was issued or renewed subject to the implied condition that it would be liable to be cancelled if the revision petition succeeded.

There is another aspect of the matter dealt with by the Supreme Court which related to the argument put forward before it, that the matter of grant or renewal of license was really one of contract and the terms of such contract could not be varied subsequent to the date on which the contract was entered into. This argument was repelled and it was held that even on the footing that the renewal of license in that case was treated as an independent grant and not a continuation of original permit there would still be no legal obstacle to implying a condition that the renewal should be cancelled if the right of the appellant to the original permit was negatived by the High Court. This to our mind settles the matter and even if we were included to give effect to the appellant's contention that the licence issued on the 7th April 1961 was an independent grant, not regardable to the real

licenses, even then there can be difficulty in holding that the license must be taken to have been issued subject to the implied condition that it was liable to be cancelled if the right to the original license was negatives.

It is true that the Bengal Excise Act and the Motor Vehicle Act are not statutes which might be said to be part matter with each other. It is also true that there is in the Bengal Excise Act no express reference to renewal of licenses except one in section 44A which discourages expectation of renewal on the part of licenses. But that section, properly read, does, not mean and imply that the authority has so right to renew. There is nothing in the Act or in the Rules which prohibits renewal. In the absence of any such express prohibition, we think it will not be right hold that the authorities under the Bengal Excise Act are precluded from renewing licenses.

It may be mentioned in passing that the appellant himself treated the last grant of the 7th April 1961 on the footing of a renewal. He describes it as a renewal in his own petition to this court; he described it was a renewed license in the letter which his Solicitor wrote for him demanding justice before he applied to this Court under Article 226.

That all grants and renewals under the Act are subject to an implied condition of reveral can well be appreciated on a reference to the provisions of the Act and the Rules. We have done as at an earlier stage of the judgment and we do not propose to recall the provisions again. Suffice it to say in this context that there is a statutory right of appeal and revision provided against grants and refusals of licenses. Such rights will became illusery if the issue of license is held to carry with the stamp of finality. The mere grant of license cannot defeat a right of appeal of a right of revision. Indeed, the Act and the Rules read together would appear to provide for a hierarchy of authorities charged with the duty of entertaining appeals and revisions at different stages and levels. It is impossible to think that the right given in such an elaborate why to challenge the decision of an authority issuing a license can be defeated merely on the ground that once a license he has been issued it become at once final and can never be said to have been issued subject to the implied condition of revocation by other authorities mentioned in the Statute.

We have no doubt that the last grant dated April 7, 1961 was a tentative grant referable to the earlier grants and it is in effect and substance a renewal although there is no express provision in the Act or in the Rules which seek to provide for such renewal. Incidentally, we might refer to the fact that the last grant was made expressly subject to the disposal of certain miscellaneous cases. They by itself is a small fact but even it seems to indicate the tentative character of the grant. On the question of what those

miscellaneous cases were, there has been considerable debt before us. We have been addressed at length on behalf of respondent No. 7 that the appellant is an undesirable person who happened to have been convicted on several occasions of excise offences and therefore a person not fit to be given a license. We have also been told that the respondent No. 7 had a clean record of running an excise shop at Port Blair. We are not concerned with these questions in this appeal. Nor are we directly concerned with the question of the eventual grant of license under Government orders in favour of respondent No. 7. The only question before us is whether the grant of license in the appellate's favour on the 7th April 1961 has survived the result of the revision petition. We are of the opinion that it has not survived for the reasons we have given.

On behalf of respondent No. 7 an objection was that the Rule out of which this appeal arises is not sufficiently wide to achieve the purpose for which it was obtained. The contention is that the Rule attacks the report of the Minister in charge dated the 24th of July, 1961 and is not directed to the order of the Government dated the 1st of August 1961. It is true that the Rule in terms does not indicate that the order of the 1st of August 1961 is directly challenged; nevertheless it is plain that the appellant in the prayer in his petition under Articles 226 made it clear that what he sought to challenge was the order of Government dated the 1st of August 1961 setting aside the license issued in his favour. Taking all the facts and circumstances into consideration, we held that this objection was rather technical and we decided to enter into the merits of the matter. Upon a consideration of the whole case, we have, therefore, come to the conclusion that there is no substance in this appeal.

Finally, we were addressed on the question as to whether it would be right in a writ appeal to interfere with an order which is to run out in the course of a fortnight. Our attention was drawn to the case of *K. N. Guruswamy V. The State of Mysore and ors*(1), in aid of the contention that the Court should not issue writs or orders to no purpose. We do not need to express any opinion on this aspect of the matter, since our decision in this appeal will not involve or require the issue of a writ. The fact is that the

(1) (1954) A.I.R. S.C. 592.

license will run out very soon still we thought that it would be right for us to express our view on the merits of the appeal and accordingly we have done

In the result, the appeal falls and is dismissed.

This will be no order as to costs.

All interim orders are vacated.

Bose, C. J.:—Agree

N. C. S.

*Appeal dismissed no order as to costs,  
interim orders are vacated.*

### ORIGINAL CIVIL

*Before the Hon'ble Mr. Justice S. P. Mitra.*

GAMBHIRMULL MAHABIR PROSAD

Vs.

THE INDIAN BANK LTD. & ORS.

Civil

1960

June, 17.

*Indian Contract Act, 1872 (Central Act IX of 1872) Sections 194, 195—Test of privity of contract between Principal, Agent and Sub-Agent—Difference in obligation between agent and sub-agent—Section 192, effect of—Damages,—liability for—measure of—Market price, meaning of*

There is as a general rule no privity of contract between the principal and a sub agent, the sub-agent being liable only to his employer, the agent. The exception is where the principal was a party to the appointment of the sub-agent, or has subsequently adopted his acts, and it was the intention of the parties that the privity of contract should be established between them.

The true test to determine whether the person appointed by an agent authorised in that behalf to perform part of the business of the agency is a substituted agent of the principal or the sub-agent of the agent, is whether the agent created privity of contract between the principal and the sub-agent. The test to be applied is the same whether the case falls within section 194 of the Indian Contract Act, 1872, or whether the person to appointed is the nominee of the principal.

There is, however, a difference in the obligation undertaken by the agent, for Section 195 of the Indian Contract Act, 1872, applies to a case falling within section 194 of that Act, while in cases where the substituted agent is the nominee of the principal, the agent is not concerned with the character or efficiency of the person so appointed, and his obligation quoad the part of the business of the agency entrusted to the substituted agent cases if and so soon as privity of contract has been created between the substituted agent and the principal.

Whatever might have been the words used in the pleadings, the relationship between the parties was to be determined upon the real character of the contract between them.

The total effect of section 192 of the Indian Contract Act is to give an option to the principal, where a fraud or wilful wrong is committed by the sub-agent to proceed against either the agent or the sub-agent.

Where the parties entered into the contract in the unsettled condition created by the Second World War, they and their agents should have foreseen the consequences of the delay in reshipment of the goods, and the delay in reshipping cannot be covered up by the plea of frustration, for it is, if at all, a case of self-induced frustration.

Where the goods are entirely destroyed or lost by a common carrier, the measure of damages recoverable against the carrier is *prima facie* the value of the property lost. The owner is entitled to the value of goods dealt in by way of trade at the place to which they were consigned. If there is a market for that description of goods at such place, the damages are the market value of the goods there at the time when they ought to have been delivered; but, if there is no market, then the damages are the cost price of the goods together with the expenses of carriage and such profits as might reasonably be expected to be made in the ordinary course of business provided that the carrier had notice that the goods were brought for resale. If the consignor has declared the value of the goods before carriage, he is bound by such declaration, and is estopped from giving evidence that the goods have any higher value. In an appropriate case, it may be proper for the seller to regard a distant market as an available market, subject to proper allowance for the additional cost of carriage.

The fact that damages are difficult to estimate and cannot be assessed with certainty or precision, does not relieve the wrong-doer of the necessity of paying damages for his breach of duty, and is no ground for awarding only nominal damages.

A distinction must be drawn, however, between cases where the difficulties are due to uncertainty as to the causation of damage, where questions of remoteness arises, and cases where they are due to the fact that assessment of damages cannot be made with any mathematical accuracy.

Lack of relevant evidence may make it impossible to assess damages at all, as where the extent of the loss is dependent upon too many contingencies, and in such cases, where the liability is established, nominal damages only may be awarded.

Where it is established, however, that damage has been incurred for which a defendant should be held liable, the plaintiff may be accorded the benefit of every reasonable presumption as to the loss suffered. Thus the Court or a jury, doing the best that can be done with insufficient material, may have to form conclusions on matters on which there is no evidence, and to make allowance for contingencies even to the extent of a making a pure guess, this is of common occurrence in claims made, for example, in respect of pain and suffering, loss of expectation of life, and the loss of a chance of winning a prize.

The market price always includes profit, and, in the absence of cross-examination, it should be held that the market price has been admitted by the defendant.

Loss of goods for failure to put the goods on a certain vessel is not an item of damage in the sense of section 73 of the Indian Contract Act.

A party which suffers a breach may also be entitled under section 73 to compensation for loss or damages caused to him which the parties knew when they made the contract to be likely to result from the breach.

If an agent should knowingly deposit goods in an improper place, and an act should accidentally take place by which they are destroyed, he will be responsible for the loss; for, although the loss is not the immediate and direct consequence of the negligence, yet it may be truly said that it would not have occurred except from such negligence, and that the negligence was the occasion, although not strictly the cause, of the loss, and that the loss may be fairly attributed to it.

The disregards subtleties and niceties as to causes and possibilities and acts upon the intelligible ground that, where there has been misconduct or negligence in the agents, all losses and damages occurring afterwards to which the property would not be exposed but for such misconduct or negligence, are fairly attributable to it, as a sufficiency proximate cause, although not necessarily the immediate or nearest cause of the loss or damage.

The measure of damages in an action by a principal against his agent for negligence or any other breach of duty by the agent in course of the agency is the loss actually sustained by the principal, provided that it was the natural and probable consequence of the breach or such loss.

The material facts will appear from the Judgment:—

Amiya Kr. Bose with Salil K. Roy Chowdhury, M. L. Tambe—*Counsel for the plaintiff.*

M. Hazra with A. C. Bhabra—*Counsel for the Defendant No. 1.*

Sachin Choudhury with P. P. Ginwalla—*Counsel for the Defendant No. 2.*

M/s. G. Bagharia & Co.—*Solicitors for the plaintiff.*

M/s. K. K. Dutta & Co.—*Solicitors for the Defendant No. 1.*

M/s. Orr Dignam & Co.—*Solicitors for the Defendant No. 2.*

The Judgement of the Court was as follows:—

**Sankar Prasad Mitra, J.:**—In this suit the plaintiff states that at the material time both the defendants had Branch offices at Rangoon. The plaintiff was a constituent of the defendant Indian Bank Ltd. in Calcutta which was acting as the plaintiffs banker's and agents and was in-charge and control of three consignments of Hosiery goods belonging to the plaintiff. The goods were lying in Rangoon. The documents relating thereto were in the custody of the defendant Bank. The goods consisted of 34 cases shipped per S. S. Hupeh, 16 cases shipped per S. S. Taksand and 2 cases shipped per S. S. Hongpeng.

On and prior to the January, 1942 the plaintiff instructed the defendant bank in Calcutta, to arrange for the immediate re-shipment of the goods, to Calcutta and if re-shipment was not possible to arrange for insurance and storage of the goods. The defendant bank informed the plaintiff that instructions to the said effect had been sent by them to their Rangoon Office on the 3rd January, 1942

By letter dated the 7th January, 1942 Mackinnon Mackenzie and Co. the defendant No. 2 herein had at the request of the plaintiff undertaken to have the consignment of 34 cases re-shipped to Calcutta immediately on receipt of a deposit and the documents relating to the goods. On the 10th January, 1942 the defendant bank at Calcutta informed the plaintiff that its Rangoon office had undertaken to arrange for the immediate re-shipment of the goods and if re-shipment was not possible to arrange for insurance of the goods against war risks and to store the same. On the 10th January, 1942 the plaintiff handed over the letter of the defendant No. 2 to the defendant bank, at Calcutta to take further action in the matter. Pursuant to their instructions the defendant bank, by its Letter dated the 10th January, 1942 to the defendant No. 2, requested the letter to arrange for the immediate re-shipment of all the three consignments from Rangoon to Calcutta and to instruct their Rangoon office to act accordingly and to accept the documents relating to the goods. Pursuant to the plaintiff's instructions the defendant bank, at Calcutta by their letter dated the 10th January, 1942 to their Rangoon Office confirmed the previous correspondence in the matter and requested the

latter to hand over the documents relating to the goods to the Rangoon office of Messrs Mackinon Mackenzie and Co. immediately with instructions to re-ship the goods at once, if re-shipment had not already been made.

By their letter to the defendant bank dated the 13th January, 1942 the defendant No. 2 undertook to arrange for re-shipment of the goods immediately on receipt of a deposit of Rs. 600/-. On the 14th January, 1942 the defendant bank on behalf of the plaintiff paid the sum of Rs. 600/- to the defendant No. 2.

The plaintiff's case is that the defendant Bank, at Calcutta agreed with the plaintiff that it would arrange for the immediate re-shipment of the goods from Rangoon to Calcutta and would forthwith hand over the documents relating thereto to the defendant Mackinon Mackenzie and Co. and that if re-shipment was impossible the defendant bank would store the goods and would arrange for insurance against war risk. It is also the plaintiff's case that the defendant Mackinon Mackenzie and Co., at Calcutta agreed with the plaintiff that they would arrange for the immediate re-shipment of the goods on receipt of the documents relating thereto. The defendant No. 2 retained the sum of Rs. 428/5/- out of the deposit of Rs. 600/- for their charges, in the matter and remitted the balance of Rs. 171/11/- to the defendant bank. The plaintiff has paid to the defendant bank. The plaintiff has paid to the defendant bank the sum of Rs. 428/5/- as also the sum of Rs. 229/- for war risk insurance charges and Rs. 12/12/- for commission and postage.

The defendant bank committed breaches of its agreement with the plaintiff and of its duties as the agent of the plaintiff and conducted the business undertaken by it negligently and without skill and diligence.

(a) The plaintiff is informed by the defendant No. 2, that on the 31st January, 1942 it received from the defendant bank, an Export licence which was not in correct form, that the licence was returned for correction to the defendant bank and was not received back by the defendant No. 2. The defendant bank was guilty of negligence in obtaining a licence which was not in correct form, in failing to get the same corrected or in obtaining the requisite export licence to hand over the same to the defendant No. 2.

(b) The plaintiff is informed by the defendant No. 2, that it did not receive from the defendant Bank any documents relating to the goods until the 31st January 1942. The defendant bank was guilty of negligence in not handing over the document to the defendant No. 2, earlier than the 31st January, 1942 or in terms of the bank's agreement with the plaintiff.

(c) The defendant bank alleges that the goods were insured against war risk by two receipts dated the 8th and the 31st January, 1942. The plaintiff does not admit that the receipts produced by the defendant bank relate to the goods in suit. The defendant bank negligently or in breach of their obligations to the plaintiff failed or neglected to insure the goods against war risk

and in any event to arrange for any effective insurance thereof or to establish any privity between the plaintiff and the insurers or to prove the loss of the goods before the insurers or to obtain compensation therefor.

(d) The defendant bank negligently or in breach of its obligations to the plaintiff failed and neglected to store or to secure the goods or to take proper care thereof.

(e) The defendant bank negligently or in breach of its obligations to the plaintiff failed and neglected to arrange for re-shipment of the goods.

The plaintiff is informed that on receipt of the documents relating to the goods the defendant No. 2 took possession thereof. The defendant No. 2 however, wrongfully and in breach of its duties and agreement with the plaintiff failed and neglected to re-ship or to arrange for the re-shipment of the goods from Rangoon to Calcutta or matters incidental thereto or to take proper care of the goods.

The goods were never re-shipped or delivered to the plaintiff by the defendants and were wholly lost to the plaintiff. The plaintiff is informed that the goods were lost sometime in February, 1942 as a result of enemy action. The plaintiff has claimed Rs. 25,000/- as the value of the goods, alternatively the three sums mentioned above aggregating to Rs. 670/11/- with interest thereon and other reliefs.

The case of the defendant bank inter alia is that its Calcutta branch was asked to collect the bills which accompanied the Bills of Lading and invoices relating to the goods from the various customers of the plaintiff. The defendant bank never acted as the plaintiffs agent or banker and was not in-charge or control of the plaintiffs goods. Pursuant to the plaintiff's directions the bank's Rangoon office finally presented to the plaintiff's customers the bills relating to the goods in suit for payment and failing to get the payments, on the 17th December 1941 sent two bills of lading together with the invoices to the second defendant at Rangoon and instructed them to store the goods in bonded warehouse and to arrange to re-ship the goods by the earliest boat available. The bank insured all the goods for their full value with effect from the 8th January, 1942 till the end of February 1942. The second defendant at its Rangoon branch accepted the bills of lading. They asked for an Export licence on the 2nd January, 1942 without which they stated the consignment would not be permitted to be shipped by the customs authorities. The bank's Rangoon office immediately applied for the licence and on receipt of the same sent it to the second defendant together with the Bills of lading on the 31st January 1942. The Rangoon office of the defendant No. 2 accepted

the licence and the documents and took possession of the goods for re-shipment. The Bank had nothing further to do in the matter. The bank in all the transactions aforesaid acted gratuitously without any special remuneration to help the plaintiff's request. There was at no point of time any agreement with the plaintiff as alleged in the plaint either to arrange for the re-shipment of the goods or to hand over the documents to the defendant No. 2 or to store the goods or to insure the goods.

Assuming that there was an agreement between the plaintiff and the defendant bank it became frustrated by the conditions in Burma at the time and became impossible of performance and as such void.

The bank's Rangoon office was informed by the defendant No. 2 that the goods could not be re-shipped for want of labour. Out of the sum of Rs. 600/- sent to the defendant bank by the plaintiff a sum of Rs. 428/5/- was paid to the defendant No. 2 as re-shipment charges and the balance was returned to the plaintiff. The sum of Rs. 229/- was paid as insurance premium. The sum of Rs. 12/12/- represents commission on the transactions of presentation of bills and postage expenses.

Assuming that the defendant bank was an agent of the plaintiff with regard to re-shipment or storage or insurance it acted in accordance with the directions of the plaintiff with all reasonable skill, care and diligence in the extraordinary or peculiar situation during the material period. In any event the plaintiff has waived its rights, if any, by letter dated the 13th January, 1943. The Export licence which was obtained by the bank was in proper form and remained with the defendant No. 2.

On the 8th May, 1943 this defendant offered to assign to the plaintiff its rights under the policy of insurance against war risks, taken out by this defendant to establish a privity between the plaintiff and the insurer but the plaintiff did not avail itself of the offer. This defendant did all that was possible to prove the claim and obtain compensation. But as it was not in a position to establish the date or the time of loss or details of the causes and circumstances thereof as required by the officer, Burma War Risk Insurance, owing to hurried and compulsory evacuation of Rangoon, compensation could not be realised. The goods were also stored in Bonded Warehouse and kept in safe custody. This defendant had to close its Rangoon office and leave Rangoon on the 18th February 1942. The defendant bank denies that the plaintiff has suffered damages due to any action on its part or that the value of the goods was Rs. 25,000. The total value as per Bills Nos OBCS 13, 14, 39 and 56, was Rs. 13,046/13/-. In any event the damages claimed are too remote. The plaintiff's claim for refund of the several sums mentioned in the plaint has also been denied.

The defence of Mackinon Mackenzie and Co., the defendant No. 2 herein inter alia is that by the letter of the 7th January, 1942 it offered to re-ship 34 cases of goods upon terms and conditions mentioned in that letter. This offer was never accepted by the plaintiff. This defendant admits that the defendant bank by its letter of the 10th January, 1942 requested this defendant to arrange for re-shipment of three consignments of goods. It denies that by its letter dated the 13th January, 1942 it undertook to arrange for re-shipment of the goods immediately on receipt of a deposit of Rs. 600/-. The defendant admits however that it received the sum of Rs. 600/- from the defendant bank on the 14th January, 1942. The agreement to re-ship the goods was made between the defendant bank and this defendant's agent Messrs. Mackinon Mackenzie (Burma) Ltd. This defendant retained the sum of Rs. 428<sup>15</sup>/<sub>100</sub>/- out of the deposit of Rs. 600/- for charges of its agents in Burma. On the 31st January, 1942 this defendant informed the plaintiff that its agent in Burma received from the defendant bank an export licence not in correct form and such licence was returned to the defendant bank. It was not received back by Messrs. Mackinon Mackenzie (Burma) Ltd. The goods were partly stored in a Bonded Warehouse and were partly in the possession of the Commissioners of the Port of Rangoon. In as much as no proper Export Licences from the Controller of War Supplies and Economic Warfare, Burma covering such goods were delivered to this defendant's agent in Burma, they could not re-ship them prior to their evacuation which was effected on the 21st February, 1942 pursuant to orders of appropriate authorities.

Alternatively if it be held that there was any agreement between this defendant and the plaintiff for re-shipment of the goods, this defendant contends that the performance of such agreement was frustrated or rendered impossible by the failure of the plaintiff or its agents to provide the agents of this defendant with proper Export Licences and by enemy action in Burma an order of the authorities for evacuation from Burma. In the premises the agreement if any to re-ship the goods was discharged. This defendant denies that the plaintiff has suffered damages amounting to Rs. 25,000/- or any part thereof. This defendant denies also that the plaintiff is entitled to refund of the various sums specified in the plaint.

Mr. Hazra appearing for the defendant No. 1 and Mr. Ginwalla for the defendant No. 2 raised two separate sets of issues on behalf of their respective clients.

The issues raised on behalf of the defendant No. 1 are as follows:—

I. (a) Did the defendant bank become the plaintiffs agent for (a) re-shipment of the goods and (b) in case of re-shipment becoming impossible for arranging their storage and insurance against war risk?

(b) If so, what were the terms, conditions and incidents of such agency?

(c) Did the defendant bank act gratuitously as alleged in paragraph 7(g) of the written statement?

2. Was there any breach or default or neglect on the part of the defendant bank as alleged in paragraph 14 of the plaint?

3. Did the plaintiff waive its rights, if any, as alleged in paragraph 14 of the written statement of the defendant bank?

4. Did the agreement of agency become frustrated as alleged in paragraph 9 of the written statement of the defendant bank?

5. Is the plaintiff entitled to the refund of money as stated in paragraph 18 of the plaint?

6. Was there any agreement as alleged in paragraph 10 of the plaint? If so, was such agreement frustrated?

7. To what relief, if any, is the plaintiff entitled?

The issues raised by learned counsel for Mackinnon Mackenzie and Co., the defendant No. 2 in this suit are as follows:—

1. Did the defendant No. 2 at any material time have a branch office in Rangoon?

2. Did the defendant No. 2 agree with the plaintiff that it would arrange for the immediate re-shipment of the goods on receipt of the documents relating thereto as alleged in paragraphs 4, 8, 11 and 12 of the plaint?

3. Was the payment of Rs. 600/- as alleged in paragraph 9 of the plaint made on behalf of the plaintiff to the defendant No. 2?

4. Did the defendant No. 2 retain the sum of Rs. 428/5/- out of the deposit of Rs. 600/- for its agents as alleged in paragraph 8 of its written Statement?

5. Did the defendant No. 2 take possession of the goods? If so, did the defendant No. 2 fail to take proper care of the goods?

6. Did the plaintiff or its agents fail to provide for a proper export licence for the said goods?

7. If there was any agreement between the plaintiff and the defendant No. 2 for re-shipment of the goods, was such agreement discharged or was the performance thereof frustrated or rendered impossible by failure of the plaintiff or its agents to provide for a proper export licence or by enemy action or by orders for evacuation from Burma?

8. To what relief, if any, is the plaintiff entitled?

Although a large number of issues have been raised on the pleadings, Mr. A. N. Bose, learned counsel for the plaintiff in his final arguments sought to restrict the scope this suit to a large extent.

In paragraph 4 of the plaint reference has been made to the letter dated the 7th January, 1942 from Mackinon Mackenzie and Co. of 16, Strand Road, Calcutta to the plaintiff firm Exhibit C page 19. In this letter the defendant No. 2 states that it shall be pleased to have the consignment of 34 cases re-shipped from Rangoon on receipt of certain documents together with a deposit of Rs. 400/-. The next letter which should be noted is dated the 10th January, 1942 (Exhibit C page 31) from the defendant bank in Calcutta to its Rangoon Office. A copy of this letter was sent to the plaintiff. The letter refers to OBCS, 13, 14, 39 and 56. The defendant bank in Calcutta acknowledges receipt of a cable from its Rangoon Office that the said office is arranging to re-ship and if the same becomes impossible to have the goods insured against war risk and store the same. A copy of a letter addressed by the defendant bank in Calcutta to Messrs. Mackinon Mackenzie and Co., Calcutta is also enclosed. The bank's Rangoon Office is advised to hand over documents to Messrs. Mackinon Mackenzie and Co., at Rangoon requesting them to re-ship the goods to Calcutta if arrangement for re-shipment had not already been made by the Rangoon branch of the bank. In the letter of the defendant bank to Messrs. Mackinon Mackenzie and Co., dated the 10th January, 1942 (Exhibit C. page 29) reference is made to its letter of the 7th January, 1942 to the plaintiff firm. It is stated that this letter has been handed over by the plaintiff to the defendant bank for further action. The letter goes on to say that the defendant bank's Rangoon Office has been asked to arrange for re-shipment of the goods. The Rangoon Office is experiencing some difficulty in doing so and the defendant No. 2 is requested to instruct its office at Rangoon to accept the relative documents from them and arrange for re-shipment at an early date, if the defendant bank's Rangoon branch had not already done so. All necessary charges in this connection would be paid by the defendant bank.

The two letters both dated the 10th January 1942 have been referred to in paragraphs 6 and 7 of the plaint. It should be noted further that in the defendant bank's letter to Messrs. Mackinon Mackenzie and Co., dated the 10th January, 1942 the request for arrangement for re-shipment is made in respect of all the 52 cases in suit and this was done under the instructions of or at the instance of the plaintiff.

Then comes the letter of the 13th January, 1942 (Exhibit C page 35) from the defendant No. 2 to the agent of the defendant bank in Calcutta, which has been mentioned in paragraph 8 of the plaint. The defendant No. 2 is replying to the letter of the 10th January, 1942 with reference to all the 52 cases. The relevant portions of the letter runs as follows:—

"We . . . . . note that you wish our Rangoon Agents to obtain the shipping documents from your Rangoon office to enable them to make necessary arrangements for the re-shipment of the above consignments to Calcutta. Owing to the present unsettled condition, we regret our inability to handle this transaction unless a deposit sufficient to cover the return steamer freight and wharfage charges is received by us and we shall be glad if you will send us a cheque for Rs. 600/- at your early convenience. We shall advise our Rangoon agents accordingly on hearing from you."

It is to be observed that this letter of the 13th January, 1942 deals with the entire lot of 52 cases. The defendant No. 2 is agreeing to arrange for re-shipment through its agents in Rangoon provided that a deposit of Rs. 600/- is made. This letter puts an end to the argument advanced on behalf of the defendant No. 2 that the argument if any to re-ship the goods was made between the defendant bank and Messrs Mackinon Mackenzie (Burma) Ltd., or that the defendant No. 2 merely requested its agents in Rangoon to re-ship.

Then on the 14th January, 1942 the defendant bank in Calcutta wrote to the defendant No. 2 enclosing a cheque for Rs. 600/-. Exhibit C page 38. It is stated in this letter that this amount is to be refunded if the Rangoon branch of the bank had already re-shipped the goods. The fact of this payment of Rs. 600/- has been pleaded in paragraph 9 of the plaint. In paragraph 12 it has been alleged that out of the sum of Rs 600/-, the defendant No. 2 retained Rs. 428/5/- for their charges and sent back the balance thereof to the defendant bank. Then there is the letter of the defendant No. 2 to Mackinon Mackenzie and Co. (Burma) Ltd. with regard to all the 52 cases dated the 15th January 1942 (Exhibit C page 39) which is as follows:—

"We have been requested by the agent, Indian Bank Ltd., Calcutta, to ask you to arrange re-shipment of the above goods to this port. They have already advised their Rangoon branch at 636, Merchant Street, to hand over the documents to you. Please get in touch with them and arrange for re-shipment of the above packages covering them against War Risk at the first opportunity. Please send your bill of charges for Collection here."

It is necessary at this stage to note the provisions of sections 194 and 195 of Indian Contract Act which run thus:—

"Section 194:—Where an agent, holding an express or implied authority to make another person to act for the principal in the business of the agency has named another person accordingly, such person is not a sub-agent but an agent of the principal for such part of the business of the agency as is entrusted to him."

"Section 195:—In selecting such an agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and if he does this he is not responsible to the principal for the acts or negligence of the agent so elected."

In *Chowdhury T. C Bnd Bros. vs. Girindra Mohan Neogi*(1). N purchased from a firm C at Calcutta a quantity of corrugated iron sheets and paid a sum of Rs. 250/ in part payment of the price. N instructed the firm to send the goods to Khulna and collect the balance of the purchase money through the Khulna Union Bank. The firm C thereupon sent the goods to Khulna and directed the Railway Receipt, their bill and demand draft with a covering letter to the National Bank of India, their Bankers at Calcutta, instructing them to collect the bills through the bank at Khulna. Contrary to instructions the Khulna Bank made over the goods to N. N delayed payment and later offered to pay by instalments. The firm C brought a suit to cover the balance from the National Bank of India. It was held that the Khulna Union Bank was the agent of the firm C for the work directed to be done at Khulna, and the National Bank was merely the conduit pipe through which the firm communicated their instructions to the Khulna Union Bank. The bank at Khulna was not the sub agent of the National Bank of India.

At page 14 of the Report, page J., observed as follows:—

(1) A.I.R. (1930) Calcutta 10.

"Now, it is common ground that the defendant Bank did appoint the Khulna bank to carry out that part of the Calcutta which was to take place at Khulna out the question to be decided is whether the defendant Bank appointed the Khulna Bank so as to act as the sub-agent of the defendant bank or as the substituted agent of the plaintiffs. The issue depends upon whether the defendant bank on behalf of the plaintiffs and the Khulna bank agreed that the Khulna bank should act at Khulna as the plaintiffs agent for the purpose of collecting the bills or, in other words, whether the defendant bank created privity of contract between the plaintiffs and the Khulna bank. In my opinion, that is the true test to determine whether the person appointed by an agent authorised in that behalf to perform part of the business of the agency is a substituted agent of the principal or the sub agent of the agent, and the test to be applied is the same whether the case falls within section 194 or whether, as in the present case, the person so appointed is the nominee of the principal although there is a difference in the obligation undertaken by the agent, for section 195 applies to a case falling within section 194, while in cases where the substituted agent is the nominee of the principal, the agent is not concerned with the character or efficiency of the person so appointed, and his obligation quoad the part of the business of the agency entrusted to the substituted agent ceases if and so soon as privity of contract has been created between the substituted agent and the principal. Now, applying this test to the facts of the present case, I am of opinion that while the letters and telegrams to the Khulna bank were sent by the defendant bank, the mandates therein contained came from plaintiff. As I apprehend the facts, in endeavouring to carry out the collection of the bills at Khulna bank was not acting under the control of the defendant bank, or so far as the collection at Khulna was concerned, the defendant bank was acting under the directions of the plaintiffs who throughout took charge of the transaction. The defendant bank, in my opinion, was merely the conduit pipe through which the plaintiffs communicated their instructions to the Khulna bank, and, inasmuch as the defendant bank invariably, I think, forwarded to the Khulna bank the communications which they received from the plaintiffs, it is clear that the Khulna bank was fully aware that the instructions which the defendant bank forwarded to them proceeded from the plaintiffs, and not from the defendant bank"

In Halsbury's Laws of England, 3rd Edition at page 172, Article 444 is as follows:—

"There is as a general rule no privity of contract between the principal and a sub-agent, the sub-agent being liable only to his employer, the agent. The exception is where the principal was a party to the

appointment of the sub-agent, or has subsequently adopted his acts, and it was the intention of the parties that privity of contract should be established between them."

In the case before me it appears that by the letter of the 7th January, 1942 addressed to the plaintiff the defendant No. 2 offered to re-ship 34 cases on receipt of a deposit of Rs. 400/- and certain documents. This letter of the 7th January 1942 was handed over by the plaintiff to the defendant bank for further action. Thereupon the defendant bank on the 10th January, 1942 wrote to the defendant 2 requesting the defendant No. 2 to arrange for re-shipment through its agent at Rangoon. Similar instructions were also given by the defendant No. 1 to its branch office at Rangoon. By letter dated the 13th January, 1942 the defendant No. 2 agreed to re-ship the goods through its Rangoon Agents upon a deposit of Rs. 600/- being made. I have already said that the defendant bank's letter of the 10th January, 1942 was in respect of 52 cases being the subject-matter of the suit. On the 14th January 1942 the defendant bank paid to the defendant No. 2 the said sum of Rs. 600/- out of which a sum of Rs. 428/5/- was retained by the defendant No. 2. On the 15th January, 1942 the defendant No. 2 communicated to its Rangoon Agents instructions for re-shipment.

This is a case, therefore, in which the defendant No. 2 was the nominee of the plaintiff. The plaintiff was a party to the appointment of the defendant No. 2 and it was the intention of the parties as can be gathered from the correspondence that privity of contract should be established between the plaintiff and the defendant No. 2. Such a privity was, in my opinion, created between the substituted agent and the principal in the instant case. The defendant No. 1 therefore is not concerned with the character or efficiency of the defendant No. 2 or any negligence on its part. The correspondence I have relied on and the factum of payment of the sum of Rs. 600/- by the defendant No. 1 to the defendant No. 2 have been set out in paragraphs 4 to 9 of the plaint. In paragraph 11 it is stated that the defendant Mackinnon Mackenzie and Co., at Calcutta agreed in the premises with the plaintiff that they would arrange for immediate reshipment of the goods on receipt of the documents relating thereto.

It is true that prior to the correspondence I have referred to these were certain negotiations between the defendant bank and Mackinnon Mackenzie (Burma) Ltd. On the 8th December, 1941 the plaintiff wrote to the Manager of the defendant bank in Calcutta with regard to OBC Nos. 14 and 39 requesting the bank to instruct its Rangoon office by cable to re-ship these consignments in case the drawees did not pay against further presentation of the bills (Exhibit C page 2).

A telegram was sent to this effect by the Agent of the defendant bank in Calcutta to its Rangoon Office on the same date (Ext. C. page 3). Then on the 16th December, 1941 the plaintiff wrote to the defendant bank again that it had not heard about re-shipment of goods covered by O.B.C. Nos. 14 and 39. The plaintiff requested the bank to remind its Rangoon Office by a cable. The same instruction was communicated with respect to another outstanding O.B.C. The plaintiff agreed to pay the costs of the cable (Ext. C. Pages 3 and 4). Upto this point of time Mackinon Mackenzie (Burma) Ltd. did not come into the picture. On the 17th December 1941 the Rangoon Office of the defendant bank wrote to the Burma Company for arranging to keep 28 cases of Cotton hosiery in the bonded warehouse and re-ship them to Calcutta by the earliest boat. The Rangoon Office advised the Burma Co., to send its bill (Ext. C. page 6). By letter dated the 2nd January 1942 the Burma Co., informed the agent of the Indian Bank at Rangoon regarding 34 cases that re-shipment would not be permitted by the Customs authorities without an export licence. The Burma Co., was arranging in the meantime to bond the goods (Ext. C page 9). From these two letters exchanged between the Rangoon Office of the Indian bank and the Burma Co. no privity was established with the plaintiff. Indeed on the 5th January, 1942 the defendant No. 2 writes to the plaintiff that it has been advised by its Rangoon agents office that 28 cases have been lying undelivered at Rangoon and are incurring demurrages. The plaintiff was asked to request the consigners to take early delivery and also to inform the defendant No. 2 of the names and addresses of the consigners to enable the Rangoon agents to communicate with them. The plaintiff was also asked to advise the defendant No. 2 regarding disposal of the goods (Ext. C page 15). This letter shows that there had not yet been a concluded agreement between the Burma Co., and the Rangoon branch of the Indian bank regarding re-shipment of the goods. There was no such agreement with the plaintiff either. By letter dated the 6th January 1942 the plaintiff requested the defendant No. 2 to ask its agents at Rangoon to re-ship 34 cases to Calcutta as the consignee had refused to take delivery. All charges would be paid by the plaintiff in Calcutta Ext. C pages 17. This is the first request by the plaintiff to the defendant No. 2. On the 7th January 1942 with reference to 34 cases the defendant No. 2 makes a counter offer to the plaintiff as follows:—

“We shall be pleased to have your consignment re-shipped from Rangoon on your sending us the following documents together with a deposit of Rs. 400/-.

- (1) Original Bill of Lading duly endorsed by you.
- (2) Invoices.

Kindly also let us know whether you require the consignment to be insured against war risks and if so kindly state the amount it should be insured for Ext. C page 19.

This counter offer of the defendant No. 2 was not apparently accepted by the plaintiff. On the 10th January, 1942 the plaintiff wrote to the defendant bank in Calcutta enclosing a copy of the letter of the defendant No. 2 dated the 7th January 1942. The plaintiff gave instructions to the defendant bank concerning all the 52 cases in suit. The instructions were as follows:—

“ In order to expediate re-shipment of the goods we shall thank you to kindly instruct your Rangoon office to hand over the required documents to Mackinnon Mackenzie and Co., Rangoon in case the former has not been able to arrange re-shipment so far. Kindly also write a letter to the Shipping Company informing them that the documents are with your Rangoon Office and that you have given your instructions to your branch as above. Vide Ext C page 27.”

Thereafter the defendant bank took up the matter and the correspondence I have already referred to had started leading to the appointment of the defendant No. 2 as a substituted agent for 52 cases for arranging re-shipment of the goods upon receipt of documents. The defendant bank became an agent of the plaintiff for handing over the documents only and through the conduit pipe of the defendant bank a privity of contract was established between the plaintiff and the defendant No. 2 as substituted agent for purposes of arranging re-shipment.

Mr. Ginwalla, learned counsel for the defendant No. 2 has contended that an agent has been defined in Section 182 of the Indian contract Act as a person employed to do any act for another and to represent another in dealings with third persons. The person for whom such act is done or who is so represented, is called the ‘principal.’ According to him in paragraph 11 of the plaint a direct agreement between the plaintiff and the defendant No. 2 has been pleaded and not an agreement of agency. In *Trojan and Co. vs. Vagappa*(1), it has been observed that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. I should observe that in *Kedarlal vs. Harilal*(2), it is stated that the Court would be slow to throw out a claim on a mere technicality of pleading when the substance of thing is there and no prejudice is caused to the other side however clumsily or inartistically the plaint may be worded. In any event, it is always open to a court to give a plaintiff such general or other relief as it deems just to the same extent as if it had been asked for, provided that occasions no prejudice to the other side beyond what can be compensated for in costs. I have said that in paragraphs 4 to 9 of the plaint the relevant correspondence has been mentioned. In paragraph 11 an agreement is pleaded between the plaintiff and the defendant No. 2 whereby

(1) A.I.R. (1953) S.C. 235-240. (2) A.I.A. (1952) S.C. 47-52.

the defendant No. 2 undertook to arrange for immediate re-shipment of the goods in suit on receipt of the relevant documents relating thereto. The expression 'substituted agent' has not been used in the plaint. But the substance of the thing is there, and I do not see that any prejudice would be caused to the defendant No. 2 if I allowed the plaintiffs claim on the basis that the defendant No. 2 was in fact and in law appointed a substituted agent of the plaintiff. I respectfully agree with the observations in *Abdul Latiff vs. Gopeswar*(1), that whatever might have been the words used in the pleadings, the relationship between the parties was to be determined upon the real character of the contract between them. Mr. Ginwalla has submitted that the letter of the 15th January, 1942 (Ext. C page 39) by which the defendant No. 2 asked the Burma Co., to get in touch with the Rangoon Office of the Indian Bank for the documents relating to the goods and to arrange for re-shipment of the goods to Calcutta has not been mentioned in the plaint at all. The letter in my opinion is not relevant for purposes of the privity of contract that was created between the plaintiff and the defendant No. 2. Mr. Ginwalla has also urged that there is no issue on substituted agency. Issue No. 2 raised on behalf of the defendant No. 2 is as follows:—

"Did the defendant No. 2 agree with the plaintiff that it would arrange for the immediate re-shipment of the goods on receipt of the documents relating thereto as alleged in paragraphs 4, 8, 11 and 12 of the plaint."

I agree with Mr. Ginwalla that there was no such agreement as alleged in paragraph of the plaint. But in paragraphs 8, 11 and 12 the allegations are as follows:—

"8. By their letter to the defendant Indian Bank Ltd., dated the 13th January, 1942 the defendant Mackinnon Mackenzie and Co., undertook to arrange for re-shipment of the said goods immediately on receipt of a deposit of Rs. 600/-.

In the said premises the plaintiff also states that the defendant Mackinnon Mackenzie and Co. at Calcutta within the said jurisdiction agreed with the plaintiff that they would arrange for the immediate re-shipment of the goods on receipt of the documents relating thereto.

The defendant Mackinnon Mackenzie and Co., retained the sum of Rs. 428/5/- out of the said deposit of Rs. 600/- for their alleged charges in the matter and remitted the balance sum of Rs. 171/11/- to the defendant Indian Bank Ltd."

In these circumstances it seems to me that issue No. 2 raised by learned counsel for the defendant No. 2 is wide enough to cover the case of a substituted agency urged by Mr. Bose in his concluding arguments.

The next point that arises for consideration is that in paragraph 1 of the written statement of the defendant No. 2 it has been denied that at any material time this defendant had a branch office at Rangoon. On the basis of this allegation issue No. 1 has been raised on behalf of the defendant No. 2. Mr. Ginwalla has contended that B.I.S.N. Co. Ltd., is the principal both of Mackinon Mackenzie and Co., the Calcutta firm and Mackinon Mackenzie (Burma) Ltd. of Rangoon. The letters dated the 7th January, 1942 (Ext. .58) and the 13th January 1942 (Ext. .06) from the Calcutta firm to the plaintiff and the Calcutta firm to the agent of the defendant bank in Calcutta respectively, the contents whereof have been noted above have both been addressed in the letter head of the Calcutta firm as Managing Agents inter alia of B.I.S.N. Co. Ltd. upon consideration of the correspondence that passed between the parties as a whole it would appear that there was no contract between the plaintiff and Mackinon Mackenzie and Co. of Calcutta. The contract, if any, was between the defendant bank and Mackinon Mackenzie (Burma) Ltd. The Burma Co., may be agent of the Calcutta firm for other purposes. But it was not an agent in respect of the Contract between it and the defendant bank. Even if a contract be spelt out of the correspondence between the plaintiff and the defendant No. 2 there is no contract under which the Calcutta firm was to re-ship the goods. The contract was to ask the Burma Co. to re-ship. Learned counsel has drawn my attention to the oral and documentary evidence in this suit in support of his contentions. He has said that the correspondence between the Calcutta firm and the plaintiff started on the 5th January 1942, but prior to that the Burma Co., had already agreed to re-ship 44 cases at the request of the Rangoon branch of the defendant No. 1 if export licence was made available to it. There was no further scope for any agreement between the Calcutta firm and the plaintiff. The defendant No. 2 therefore came into the transaction as Managing Agent of B.I.S.N. Co. Ltd. In the correspondence the Burma Co., is also treated as an agent in Burma of B.I.S.N. Co., Ltd. Meanwhile the plaintiff had asked the defendant bank to re-ship the goods. The defendant bank asked its Rangoon branch to re-ship in its own name or store or insure the goods mixing them up with the goods of other customers. The Rangoon branch was acting on its own account pursuant to instructions of its Calcutta office and entered into an agreement with the Burma Co., with regard to 44 cases. On the 31st January, 1942 the Rangoon branch sent to the Burma Co., the export licence together with bills of lading in respect of 52 cases (Vide Ext. C page 20). Malcolm Horton Lacey who at the material time was an assistant of the Burma Co., was examined *de bene esse* before McNair, J. He has stated in his evidence that until the 31st January, 1942 no documents were sent to the

Burma Co., with regard to the 8 cases. The effect of his evidence is that the Burma Co., retained these documents (questions 89 to 91). That is how according to Mr. Ginwalla the Burma Co., accepted liability for all the 52 cases. Learned counsel also drew my attention to the letter dated the 22nd May, 1943 (Ext. C page 145) from G. Bagaria, Solicitor to Mackinon Mackenzie and Co., Calcutta. It is stated in this letter that the plaintiff had entrusted to the defendant bank the 52 cases in suit for re-shipping the same to Calcutta from Rangoon. The defendant bank in its turn appointed Mackinon Mackenzie and Co., Calcutta to do so. Then it is said that there has been a lot of correspondence between various parties including the Burma Co., which is described as the Calcutta firm's Rangoon representative. Mr. Ginwalla has submitted that the plaintiff's confusion can be noted in this letter, the confusion that the Calcutta firm and the Burma Co., are the same. But the sequence of events has been correctly represented in this letters. The sequence is that the plaintiff instructed the defendant bank and the defendant bank arranged with the Burma Co. In other words the Burma Co., was an independent entity.

I have already discussed above the effect of the correspondence with the Burma Co., at the earlier stage, and have expressed the opinion that ultimately the defendant No. 2 was appointed the substituted agent of the plaintiff for purposes of re-shipment of the 52 cases in suit. I have to add that in paragraph 7 of the written statement of the defendant No. 2 it is alleged that the agreement if any, to re-ship the goods was made between the defendant bank and the agent of the defendant No. 2 Messrs. Mackinon Mackenzie (Burma) Ltd. In paragraph 8 it is stated that the defendant No. 2 retained Rs. 428/5/- out of the deposit of Rs. 600/- made by the defendant Bank. It retained the amount for the charges of its and agents. In paragraph 10 it is stated inter alia that until their evacuation from Burma Messrs. Mackinon Mackenzie and Co. (Burma) Ltd.) were the agents of the defendant No. 2. At the request of the defendant bank made in such banks letter to the defendant No. 2 dated the 10th January, 1942 and the 14th January 1942 the defendant No. 2 requested its agents Messrs Mackinon Mackenzie and Co., (Burma) Ltd. to arrange to re-ship the goods in Calcutta. Inasmuch as no proper export licences were delivered to the said agents of the defendant No. 2 such agents could not re-ship the goods prior to their evacuation from Burma, which was effected on or about the 21st February, 1942. Then again in the correspondence that passed between the parties repeatedly the Burma Co., has been described as the Rangoon Agents of the defendant No. 2. In the letter of the defendant No. 2 dated the 13th January, 1942 (Ext. C page 35) for instance in which the offer to re-ship on receipt of a deposit of Rs. 600/- was made to the defendant banks' Calcutta office it is stated inter alia as follows:—

“We . . . . . note that you wish our Rangoon agents to obtain shipping documents from your Rangoon office to enable them to

make necessary arrangements for the re-shipment of the above consignments to Calcutta. Owing to the present unsettled condition, we regret our inability to handle this transaction unless a deposit sufficient to cover the return steamer freight and wharfage charges is received by us and we shall be glad if you will send us a cheque for Rs. 600/- at your early convenience. We shall advise our Rangoon agents accordingly on hearing from you."

On the 14th January, 1942, as I have said the defendant bank sent to the defendant No. 2 the sum of Rs. 600/- by cheque. Mr. Ginwalla has stated that by the letter of the 14th January 1942 (Ext. C page 38) the defendant bank did not unconditionally accept the offer of the defendant No. 2 contained in its letter of the 13th January, 1942. The defendant bank said in this letter that the deposit of Rs. 600/- was to be returned in case its Rangoon branch had in the meantime been able to re-ship the goods. There is some force in this contention of learned counsel but I find in paragraph 8 of the written statement of the defendant No. 2 the clear admission that it retained Rs. 428/5/- out of the deposit of Rs. 600/- being the charges of its Rangoon agents.

In the face of the repeated admissions of the defendant No. 2 in the correspondence as well as in its written statement that Mackinnon Mackenzie and Co. (Burma) Ltd., was the agent of the defendant No. 2 in Burma in respect of the transactions in suit I am unable to agree with Mr. Ginwalla that the Burma Co. was independent of the defendant No. 2 and accepted liability for 52 cases on its own.

Section 192 of the Indian Contract Act provides that where a sub-agent is properly appointed the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for its act, as if he were an agent originally appointed by the principal. The agent is responsible to the principal for the act of the sub-agent, the sub-agent is responsible for his acts to the agent, but not to the principal except in case of fraud or wilful wrong. The plaintiff in the instant case could not have filed a suit against the Burma Co. Even if it be held that negligence on the part of the sub-agent is a 'wilful wrong' the right of recourse to the sub-agent, does not exclude the principal normal right of recourse to his agent. In fact, the total effect of section 192 is to give an option to the principal where a fraud or 'wilful wrong' is committed by the sub-agent. See Pollock and Mulla an Indian Contract and Specific Relief Acts, 8th Edition, page 640.

It has been urged by Mr. Ginwalla that the defendant No. 2 is the agent of B.I.S.N. Co. Ltd., and the plaintiff has no cause of action against this defendant. The letter of the defendant No. 2 dated the 5th January, 1942 (Ext. C page 15) is in the letter head of B.I.S.N. Co., Ltd. In this letter the defendant No. 2 informed the plaintiff that it was advised by its Rangoon agent's

office that 34 cases were lying undelivered at Rangoon and were incurring demurrage. The plaintiff is asked in this letter to request the consignees to take early delivery and also to intimate their names and addresses to the defendant No. 2 to enable its agent to communicate with the consignees. Alternatively, the plaintiff was to advise the defendant No. 2 regarding the disposal of the goods. Advisedly the letter-head of B.I.S.N. Co. Ltd., was used because it was that company which carried the goods from Calcutta to Rangoon. But the subsequent letter-heads are those of Mackinon Mackenzie and Co. Indeed the vital letters dated the 7th January 1942 (Ext. 05) and the 13th January, 1942 (Ext. 06) are both in the letter heads of Mackinon Mackenzie and Co., 16, Strand Road, Calcutta. In this letter head the defendant No. 2 is described as Managing Agent of 6 limited companies including B.I.S.N. Co. Ltd., and as agent for 10 other different concerns. In these circumstances I am unable to agree with Mr. Ginwalla that the defendant No. 2 agreed with the plaintiff to arrange for re-shipment of the goods as an agent of B.I.S.N. Co. Ltd.

An alternative argument was advanced by Mr. Bose on the basis of section 230 and 233 of the Indian Contract Act. Section 230 provides that, in the absence of any contract to that effect, an agent cannot personally enforce contracts entered in to by him on behalf of the principal, nor is he personally bound by them. Such a contract shall be presumed to exist, inter alia, which the principal, though disclosed, cannot be sued. Section 233 provides that in cases where the agent is personally liable a person dealing with him may hold either him or his principal, or both of them, liable. Mr. Bose's contention is that assuming that B.I.S.N. Company Limited was the principal, it was a foreign company. A company having its registered office in England but carrying business in India will be deemed to be resident in England for the purposes of section 230. Where a contract therefore, is entered into by the "Managing Agents" of such a company in India, it can be enforced against the agents personally unless the foreign company is in writing made the contracting party and the contract is made directly in its name. Pollock and Mulla an Indian Contract and Specific Relief Acts pages 701 to 702. I do not propose to entertain this alternative argument of the learned counsel for the plaintiff in the absence of any indication in the point that the defendant No. 2 entered into the contract on behalf of a foreign principal. From the documentary evidence on record however I am of opinion that the defendant No. 2 was not an agent at all. The contract was between the plaintiff and the defendant No. 2.

I shall now discuss whether the defendant No. 2 took possession of the goods and, if so failed to take proper care thereof. I have said that in my view at the material time the Burma Company was acting as the agent of the defendant No. 2. Malcolm Lacey has said in his evidence that 44 cases were

bonded by the Burma Company prior to the 31st January, 1942. The documents relating to the remaining 8 cases were made over by the Rangoon Branch of the defendant bank on the 31st January 1942. These 8 cases were in Selo Pagoda Wharf and not in any bonded warehouse. The reason why these packages were not bonded was that Lacey had invited the Assistant Collector of Customs to discuss with him the situation regarding labour and the useless amount of time involved in bonding the goods. He asked the Assistant collector to consider the Burma Company's application for re-shipment of cargo of such a nature and came to learn that the application would be considered upon receipt of the export licence. He admits that export licence along with bills of lading for 52 cases were brought to him on the 31st of January or the 2nd of February 1942. According to him the Bills of lading were retained and the export licence was returned for correction to the agent of the defendant bank's Rangoon office who brought them (Questions 86 to 92 and 261 to 268). I shall discuss a little later if Lacey's evidence on return of the export licence can be accepted. For my present purpose it is enough to say that he has admitted that bills of lading in respect of 52 cases were accepted and retained by him. Mahadeva Ramamurtty who was the agent of the Rangoon branch of the defendant bank at the material time was examined on commission. He has stated that the 8 cases were not bonded as he expected re-shipment. He had the goods insured (questions 182 to 190). It appears therefore that on the 31st January 1942 or at any rate on the 2nd February, 1942 the Burma Company was in possession of the relevant documents of title relating to the 52 cases in suit possession of the documents meant in the circumstances of this case constructive possession of the goods. And in the context of the present case failure to arrange for re-shipment amounted to failure to take proper care of the goods. This observation however is subject to my decision on Issue No. 6 raised on behalf of the defendant No. 2 as to whether the plaintiff or its agent failed to provide for a proper export licences. It would be convenient to discuss this point at this stage. Indeed this is the most important issue in this suit and I have to analyse the relevant oral and documentary evidence on this point in details.

I have already indicated that Lacey's case is that on or about the 31st January 1942 an agent of the Indian Bank at Rangoon came to him with a letter addressed by the Rangoon branch to the Burma Company dated the 31st January 1942 (Ex. .01). The opening paragraph of this letter is as follows:—

“We herein enclose the export licence granted to us by controller of war supplies and Economic Welfare together with relation bills of lading to be re-booked to Bombay and Calcutta.”

Lacey checked the export licence with the bills of lading and discovered certain discrepancies. He retained the bills of lading but returned the export

licence to the bank's agent for necessary correction. He has made an endorsement in pencil on the second page of this letter as follows:—

“Export licence returned to the Indian Bank Limited for alteration of certain particulars.”

The export licence according to Lacey was never returned to the Burma Company by the bank and as such it was impossible to re-ship the goods before evacuation: (vide evidence of Lacey, questions 39 to 53 and 74-75).

On the 2nd February 1942 the agent of the Rangoon Branch wrote to the Calcutta office of the defendant bank that the export licence had been received on that day (Ex. C page 45). It has been handed over to the Burma Company with instructions to re-book the goods to Calcutta. Mahadeva Ram-murtty says in his evidence that he forwarded the export licence to Mackinnon Mackenzie and Co. (Burma) Ltd. (Question 41). In question 42 he has stated that the licence was never returned to the Indian Bank after it was handed over to the Burma Company on the 31st January, 1942. He wrote to the Calcutta office about this fact on the 2nd February, 1942 (Question 43). His attention was drawn to both the letters dated the 31st January 1942 and the 2nd February, 1942 (Ex. 'C' pages 43 and 45). His explanation is that he had typed the letter dated the 31st January, 1942 addressed to the Burma Company on that day. The letter was despatched on the 2nd February, 1942 as 31st January 1942 was a Saturday. The letter was sent by a peon and no clerk of the bank had accompanied him. The peon book was left in Burma at the time of evacuation (Questions 53 to 57). In this view of the matter the statement in the letter of the 2nd February (Ex. 'C' page 45) that the licence had been received on that day is not correct. It seems to me on the evidence that the bank got the licence on or about the 31st January and delivered it to the Burma Company on the 2nd February 1942. The last boat sailed from Burma on the 19th February 1942. And Lacey has stated in question 63 that the export licence had been received on the 7th February re-shipment could possibly have been effected.

I have now to examine whether any re-licence can be placed on the pencil writing of Lacey on the letter of the 31st January, 1942.

After discussing evidence (paras 49 to 60). His Lordship proceeded. So far as the pencil writing on the letter of the 31st January 1942. (Ex. .01) is concerned. Mr. Bose, learned counsel for the plaintiff, has commented that it is impossible to detect the age of a pencil writing persons who want to interpolate documents often resort to pencil writings. I think there is some force in this contention of Mr. Bose. In any event I am of opinion that the pencil writing of Lacey on Ex. '01' is a subsequent interpolation. I hold

therefore that the plaintiff or its agents did not fail to provide the Burma Company the agent of the defendant No. 2 for purposes of re-shipment with a proper export licence in respect of the goods in suit. That is how I answer Issue No. 6 raised on behalf of the defendant No. 2.

I shall now consider if the agreement between the plaintiff and the defendant No. 2 for arranging re-shipment of the goods was discharged or the performance thereof was frustrated or rendered impossible by the failure of the plaintiff or its agents to provide for a proper Export licence or by enemy action or by orders for evacuation from Burma. I have held that there was no failure on the part of the plaintiff or its agents to provide for a proper Export licence. The licence was received by the Burma Company as an agent of the defendant No. 2, it appears from the evidence on record, on the 2nd February 1942. Lacey has said in question 213 that the Burma Company had shipped hundred tons of rubber on the 19th February 1942. On this evidence of Lacey it would be reasonable to conclude that the Burma Company after receiving the export licence on the 2nd February, 1942 had sufficient time to arrange for re-shipment of the goods. Indeed Lacey has said in question 63 that its Export licence had been received on the 7th February, 1942 re-shipment could possibly have been effected. In the premises I hold that the agreement between the plaintiff and the defendant No. 2 for arranging re-shipment was not discharged nor was its performance frustrated, or rendered impossible either by failure on the part of the plaintiff or its agents to provide for a proper Export licence or by enemy action or by orders for evacuation from Burma. It should be remembered that the parties entered into the contract in the unsettled conditions created by the second World War. In view of the international situation the agent of the defendant No. 2 should have foreseen the consequences of the delay in re-shipment of the goods; vide *Manarch Steamship Co. Ltd. vs. Karlshamns Oljefabriker*(1). The delay in re-shipping cannot be covered up by the plea of frustration. If at all it is a case of self-induced frustration.

Coming now to the question of damages suffered by the plaintiff Mr. Bose has argued that under section 212 of the Indian Contract Act an agent is always bound to act with reasonable diligence and to use such skill as he possesses and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct. In the instant case if the defendant No. 2 had not left the goods behind in Rangoon the loss would not have occurred. The direct cause of the loss was the failure to re-ship. The defendant No. 2 knew how the war situation was developing; the defendant No. 2 also knew

that failure to re-ship would have the result of the goods falling into the hands of the enemy, the failure on the part of the defendant No. 2 to re-ship therefore is the direct cause of the loss by enemy action. In its letter to the International Bank of India Limited dated the 19th May, 1942 (Ex. 'C' page 80) the defendant No. 2 has stated that.

"Owing to the occupation of Rangoon by enemy the goods and documents must be considered as lost."

The proximate cause of this loss is the leaving of the goods at Rangoon without re-shipment and not the arrival of the enemy. The probability of such arrival was in the contemplation of the parties. The loss of the goods was a direct consequence of the neglect of the defendant No. 2 to arrange for re-shipment and the defendant No. 2 has to make compensation for it.

Where the goods are entirely destroyed or lost by a common carrier, the measure of damages recoverable against the carrier is prima-facie the value of the property lost. The owner is entitled to the value of goods dealt in by way of trade at the place to which they were consigned. If there is a market for that description of goods at such place, the damages are the market value of the goods thereat the time when they ought to have been delivered; but if there is no market, then the damages are the cost price of the goods together with the expenses of carriage, and such profits as might reasonably be expected to be made in the ordinary course of business provided that the carrier had notice that the goods were brought for re-sale. If the consignor has declared the value of the goods before carriage, he is bound by such declaration, and is estopped from giving evidence that the goods have any higher value. Halsbury's Laws of England, 3rd Edition Vol. 4, page 151 Article 399. In an appropriate case it may be proper for the seller to regard to distant market as an available market, subject to proper allowance for the additional cost of carriage, *Mayne on Damages*(1).

On these authorities Mr. Bose contends that if there was no available market at Rangoon, the plaintiff is entitled to rely on a distant market. In any event the goods were being booked for Calcutta and the loss that the plaintiff has suffered is the Calcutta price.

The fact that damages are difficult to estimate and cannot be assessed with certainty or precision does not relieve the wrong-doer of the necessity of paying damages for his breach of duty, and is no ground for awarding only nominal damages. A distinction must be drawn, however, between cases where the difficulties are due to uncertainty as to the causation of damage, where questions of remoteness arise, and cases where they are due to the fact that assessment of damages cannot be made with any mathematical accuracy. Lack of relevant evidence may make it impossible to assess damages at all, as where the

(1) ( ) 11th Edition page 183.

extent of the loss is dependant upon too many contingencies, and in such cases where the liability is established, nominal damages only may be awarded. Where it is established, however, that damage has been incurred for which a defendant should be held liable the plaintiff may be accorded the benefit of every reasonable presumption as to the loss suffered. Thus the Court, or a jury doing the best that can be done with insufficient material, may have to form conclusions on matters on which there is no evidence, and to make allowance for contingencies even to the extent of a making a pure guess; this is of common occurrence in claims made, for example, in respect of pain and suffering, loss of expectation of life, and the loss of a chance of winning a prize; Halsbury's Laws of England, 3rd Edition, Vol. II page 226 Article 394.

Kasturchand, a partner of the plaintiff firm has deposed in this suit. He says that the invoices correctly describes the number of the goods, their rates and values. In November, 1941 the goods used to be sold at those rates. In January, 1942 the rates did not go up. But in February/March, 1942 they went on increasing Exhibit 'D' consists of carbon copies of the invoices which were shown to this witness. The total price of all the goods shown in these invoices is Rs. 13,046/13/- In January the rates were approximately the same. After January they started rising. Kasturchand tried to find from other dealers the prices of hosiery goods similar in kind in 1941 and early in 1942. But since 17 or 18 years have elapsed no records were available from such dealers. The rates at which the goods in suit were sold would appear in the invoices. They were the market prices of these goods in November 1941. Kasturchand cannot say at what price these goods had been bought by the plaintiff. They could be found in the Jama Book but it was not available. He does not remember whether this book was disclosed at the time the suit was instituted. In the prices given in the invoices reasonable profit of the plaintiff has been included. Kasturchand does not know that was the price of the goods at Burma at the end of December, 1941 or in January or the beginning of February 1942. The goods in suit consisted of goods manufactured by Mills in Calcutta, by Mills in Southern India as well as goods manufactured by the plaintiff. He then said that all the goods that were despatched to Burma were purchased by the plaintiff (Questions 21, 24 to 30, 66 to 70, 78, 113 to 120, 260 to 272).

It is evident that Kasturchand has failed to prove the prices at which the goods were purchased by the plaintiff. But Mr. Bose contends that it was not suggested to him in cross-examination that the reasonable profit he has spoken of would have wiped out the entire sum of Rs. 13,046/13/-. It was not also suggested that the prices mentioned in the invoices were not the market prices in Calcutta. The market price always includes profit and in the absence of cross-examination it should be held that the market price has been admitted by the defendant No. 2. In paragraph 21 of the written statement of the de-

fendant No. 1 the plaintiffs claim for Rs. 25,000/- has been denied. But it is stated that the total value of the goods as per Bills Nos. OBCS 13,14, 39 and 56 was Rs. 13,046/13/-. Ramamurty has stated in question 21 that these goods were insured for Rs. 13,100/- though accurately they should have been insured for Rs. 13,046/13/-. In *A. V. Joseph vs. R. Shew Bux*(1), it was agreed under a C. I. F. Contract between S. and J. that if S. failed to take delivery of certain timber in time, J. was to dispose of the same locally and S. was to pay him the difference in price. S. failed to take delivery. Thereupon J sold the timber up by action in a regular manner and sued for the difference. It was urged that J. did not give clear evidence of the freight, the insurance, the loading charges and certain port or customs duties, which had to be deducted. It was held by the Privy Council that as S. called on evidence on those points at all and there was no suggestion on his side that these expenses would have wiped out the difference, the Appellate Court in India was not justified in awarding to J. nominal damage of Re. 1/- only. Their Lordships of the Judicial Committee made certain deductions and assessed the damage at Rs. 18,502/- and a decree was passed accordingly. There was evidence in this case as to customs and loading charges as also the maximum rate of freight. The insurance charges their Lordships thought could be safely taken at 10/16th per cent. The evidence which the plaintiff gave was that the total combined ordinary maritime risk and war risk it being questionable whether he would have to pay the war risk—came in the following February, to 10/16th per cent and, in a general way, he implied that this was the rate by insurance which he thought was due at the time. The Judicial Committee was of opinion that the evidence was not of the very best, and every presumption should be made against the plaintiff; if there is any range, the range should be taken against him; but the defendant called no evidence on these points at all, and the Board was entirely without trace of any suggestion on the defendant's behalf that these expenses could have wiped out the otherwise apparent great loss. The Board was of the opinion that there was an element of uncertainty which might have made it desirable that the matter should be sent back for enquiry, but neither counsel had pressed for that, and, their Lordships thought, very wisely, because the amount that could be taken off on a possible enquiry would bear a very small proportion to the expenses of such an enquiry. In these circumstances their Lordships, without dissent of counsel, had taken the matter into their own hands and had assessed the damage in the manner aforesaid.

In *Rameswar Bazar vs. Shyuma Sundari Debi*(2), there was a contract for the sale of lands containing valuable minerals and it was stipulated that if ever any dispute over title arise, with a Rajah, a third person, then the promisor would remain liable for the sale; he would give the promisee all necess-

(1) (1918) 23 C.W.N 601; A.I.R. (1918) P.C. 149. (2) A.I.R. (1926) P.C. 37.

ary papers, etc. for the establishment of his title. It was held in the face of the clause it was impossible to construe the contract as one in which the promisor warranted the mineral as conveyed, and all that the vendee if the contract was implemented was to get was the chance of either fighting the Rajah or by having secured the surface rights, being in a position to hamper the Rajah in letting to anyone else, and consequently compelling him to grant fair terms to the plaintiff himself. The trial Judge found that there was a contract and a breach thereof and assessed the damages at Rs. 1,20,000/- the calculation being on the figure of Rs. 200/- per bigha on the 600 bighas, which he considered to be the size of the field. On appeal the judgment was affirmed as to the contract and the breach but the damages were reduced to Rs. 5,000/- on the ground that these were no materials on which to assess the figure found by the trial Judge. On the question of the quantum of damages the Judicial Committee upheld the Appellate Court. Their Lordships were of the view that exact valuation of the lost chance was impossible, and the plaintiff had led no evidence to make approximate valuation easy. In the circumstances the Appellate Court acting as a Jury would have done, allowed Rs. 5,000/-. Their Lordships did not think it proper to interfere with this determination. There was no cross appeal in this case by the respondent as to the question of there being a contract.

Learned counsel for the plaintiff has placed strong reliance on these two decisions of the Privy Council. In *A. V. Joseph vs. R. Shew Bux*(1), damages were assessed and awarded on insufficient or inadequate materials. In *Rameswar Bazar Case*(2) damages were awarded without any evidence. Mr. Bose also relied on the judgment of Sir Ashutosh Mookerjee in *F. T. Kingslay Secretary of State for India*(3). In this case a grant entitled a license to an exclusive right to catch elephants within defined tracts and for a specified period. The learned Judge observed that though every breach of duty arising out of contract gives rise to an action for damages without proof of actual damages the amount of damages recoverable was, as a general rule, governed by the extent of the actual damage sustained in consequence of the defendant's act. In cases admitting of proof of such damages, the amount must be established with reasonable certainty. But this does not mean that absolute certainty is required, nor, in all cases, is there a necessity for direct evidence as to the amount. Damages are not uncertain for the reason that the loss sustained is incapable of proof with the certainty of mathematical demonstration or is to some extent contingent and incapable of precise measurement.

Mr. Ginwalla, learned counsel for the defendant No. 2, relied on section 73 of the Indian Contract Act and contended that in case of a breach of

(1) (1918) 23 C.W.N. 601, A.I.R. (1918) (2) A.I. (1926) P.C. 37, P.C. 149.

(3) (1918) 33 C.I.J. 271; A.I.R. (1923) Calc. 49.

contract the party who suffered the breach was entitled to compensation, inter alia, for any loss or damage caused to him which arose in the usual course of this. Loss of goods is not an item of damage in this sense for failure to put the goods on a certain vessel. A party which suffers a breach may also be entitled under section 73 to compensation for loss or damages caused to him which the parties knew when they made the contract, to be likely to result from the breach. On the 14th January, 1942 when the contract is said to have been complied it could not be said that the parties in Calcutta knew that if the goods were not shipped as soon as the Export licence was obtained, the goods would be lost. In fact, when the contract was entered into there was no question of obtaining an Export licence.

Mr. Ginwalla also contended that the breach itself, if any, did not cause the loss of the goods Rangoon fell to the Japanese forces and that was the cause of the loss.

I am unable to agree with his contentions. If an agent should knowingly deposit goods in an improper place, and a—the should accidentally take place by which they are destroyed, he will be responsible for the loss. For, although the loss is not the immediate and direct consequence of the negligence, out of the lire, yet it may be truly said, that it would not have occurred except from such negligence. The negligence, then, was the occasion, although not strictly the cause, of the loss; and the loss may be fairly attributed to it. If a carrier—master of a ship should unnecessarily deviate from the proper course of the voyage, and the goods shipped should afterwards be injured by a tempest, or should be lost by capture or other peril, the shipper would be entitled to a full indemnity from the shipmaster and shipowner. In these cases, although the misconduct or negligence of the agent is not the direct and immediate cause of the loss, yet it is held to be sufficiently proximate, to entitle the principal to recover for loss or damages; for, otherwise the principal would ordinarily be without remedy for such loss or damage; since the same objection would apply in almost all cases of this sort. The law disregards such subtleties and niceties, as to causes and possibilities, and it acts upon the intelligible ground that, where there has been misconduct or negligence in the agent, all losses and damages occurring afterwards to which the property would not be exposed, but for such misconduct or negligence, are fairly attributable to it as a sufficiently proximate cause, although not necessarily the immediate or nearest cause of the loss or damage. The doctrine too, may be vindicated upon the broader ground of public policy, that no wrong doer ought to be allowed to apportion or qualify his own wrong; and that, as a loss has actually happened, whilst his wrongful act was in operation and force, which is fairly attributable to his wrongful act, he ought not to be permitted to set up as a defence, that there was a mere immediate cause of the loss, acting upon the subject-

matter at the same time, or a bare possibility of loss, if his wrongful act had not been done; see Story on Agency, 9th Edition, pages 260 to 262. It is essential to a cause of action that the act complained of should be the real or effective cause of the injury or loss sustained. Various phrases have been used in the older cases to indicate this requirement the phrase now usually adopted is 'direct cause' although "proximate cause" is still often used as its equivalent; vide Mayne on Damages(1).

Applying these principles to the facts of this case it seems to me that the loss of the goods was the direct or proximate cause of the neglect or failure of the agent of the defendant No 2 to arrange for re-shipment of the goods from Rangoon to Calcutta after receiving the export licence and the documents relating to the goods on the 2nd February, 1942.

Mr. Mahadeb Hazra, learned counsel for the defendant No. 1 has urged that the damages suffered by the plaintiff have not been proved. In paragraph 17 of the plaint, a sum of Rs. 25,000/- has been claimed as the value of the goods which has not been proved. Kasturchand has said in his evidence that the value is a little over Rs. 13,000/- including reasonable profit of the plaintiff. If the damage was due to non-shipment the value of the goods in Calcutta at or about the date the ship would have reached Calcutta would be the value which the plaintiff can claim. But in this case that value has not been proved. The oral evidence of Kasturchand in the absence of relevant books of account regarding market prices in different months should not be accepted.

Mr. Ginwalla for the defendant No. 2 has adopted the arguments of Mr. Hazra to a certain extent. He has relied on the decision of Chatterjee, J. in *G. A. Jolli vs. Dominion of India*(2), for the proposition that when goods are lost by the Railway and in consequence the plaintiff loses the profits which he could have earned, the value of the lost goods can be recovered, but not any profits in the absence of proper notice. Learned counsel has stated further that if the Calcutta rate was higher than the Burma rate, the plaintiff can claim the difference but without knowing the Burma rate this difference cannot be assessed. Secondly, if it be held that goods were lost not due to breach of contract to arrange re-shipment but due to enemy action, the plaintiff would recover the difference in cost that was necessary to engage some other agent for re-shipment as damages. Thirdly, if the goods were lost on account of the failure to arrange for re-shipment the plaintiff would recover the value of the goods at the destination, namely, Calcutta which means that he can recover the price, at which he could have bought the goods and not the price at which he could have sold

(1) 11 Edition page 45.

(2) A.I.R. (1949) Calcutta 380.

I have agreeing with the contention of Mr. Bose, held that on the facts of this case the goods can be said to have been lost due to the neglect or failure of the defendant No. 2 to arrange for re-shipment of the goods from Rangoon to Calcutta. According to Mr. Hazra the plaintiff can claim in that event the value of the goods in Calcutta at or about the date the ship would have reached Calcutta. According to Mr. Ginwalla the plaintiff can recover the price at which it could have bought the goods at the relevant time. The plaintiffs witness Kasturchand has stated before me that the rates mentioned in the invoices were the rates at which these goods used to be sold by the plaintiff in November 1941. The rates in January, 1942 were not higher but in February, March 1942 they went on increasing due to the war. He has admitted that these rates include reasonable profits of the plaintiff. It is true that the plaintiff should have proved the quantum of reasonable profit. I might have directed a reference to ascertain the quantum but that was not asked for, presumably in view of the expenses involved. In any event no useful purpose will be served by directing a reference. Kasturchand says his relevant books are no longer available and there is also no dealer who can depose about the rates to be enquired into after 17 or 18 years. But at the same time; in the absence of any evidence or suggestion in cross-examination to Kasturchand that the plaintiffs reasonable profit would wipe out the total sum of Rs. 13,046/13/-, it would not be just or fair to award to the plaintiff only nominal damages in this suit. Similar situations arose in the cases reported in *A. V. Joseph vs. R. Shaw Bux*(1). I find from the invoices that certain expenses incurred by the plaintiff on Dingi freight, insurance, freight and empty cases and other sundry expenses for sending the goods from Calcutta to Rangoon have been added to the invoice prices. After deducting these expenses the price of the goods comes to Rs. 12,327/11/-. The sum of Rs. 12,327-11-0 according to Kasturchand was the price at which these goods used to be sold in Calcutta by the plaintiff in November and December, 1941 and in January, 1942. From February and March 1942, the prices went on increasing. The sum of Rs. 12,327-11-0 included "reasonable" profit to the plaintiff. What this "reasonable" profit was Kasturchand did not prove. Having regard to the decisions of the Judicial Committee reported in *A. V. Jesph vs. Shew Bux*(1), in similar circumstances it may be safely assumed that the plaintiff's "reasonable" profit could not have exceeded 33 $\frac{1}{3}$ %. Mr. Bose submitted that a profit of more than 10 to 5% was not "reasonable." But since his client has adduced no evidence on the point I am inclined to fix the maximum at 33 $\frac{1}{3}$ %. If this maximum profit be taken into account a sum of Rs. 4109-3-8 would have to be deducted from Rs. 12,327-11-0 and the price at which the plaintiff had purchased the goods comes to at least Rs. 8218-7-4. I will add to that Rs. 428/5/- which was retained by the defendant No. 2 as charges for re-shipment. The total sum, therefore, payable by the defendant No. 2 to the plaintiff comes to Rs. 8646-12-4. The measure of damages in an action by a

(1) (1918) 23 C.W.N. 601; A.I.R. (1918) P.C. 149; A.I.R. (1926) P.C. 37.

principal against his agent for negligence or any other breach of duty by the agent in course of the agency is the loss actually sustained by the principal, provided that it was the natural and probable consequence of the breach or such loss as in the particular circumstances the agent might reasonably have expected to result from such negligence or breach of duty. Bowstead on Agency, 11th Edition page 111 Article 58. To my mind, on the facts of this case, the minimum amount of loss actually sustained by the plaintiff is the sum of Rs. 8646-12-4 for which the defendant No. 2 is liable.

Another point taken by Mr Ginwalla is that the plaintiff had sold the goods to different persons in Rangoon. The property in the goods did not retain in the plaintiff and, as such, the plaintiff was not entitled to claim the price. There is neither any pleading nor any issue on this point. In any event under section 110 of the Indian Evidence Act when the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not owner is on the person who affirms that he is not the owner. The evidence in this suit is that the Indian Bank was in possession of the goods as an agent of the plaintiff and documents relating thereto were not to be delivered to the purchasers in Rangoon till payments were made by them. Kasturchand in question 151 has admitted that the purchasers in Rangoon told the plaintiff about the quantity of the goods and the quality of the goods and the size of the goods and left it to the plaintiff to send them. The plaintiff's bills were sent to the Rangoon branch of the defendant bank for presentation to the purchasers. Upon payments being effected by the purchasers they could obtain delivery of the goods. By letter dated the 8th December 1941 to the Manager, Indian Bank Calcutta (Ex. C Page 2) the plaintiff requested the Manager to instruct the Rangoon branch to present to the drawees OBC Nos. 14 and 39 once again and if the drawees did not pay, the consignments were to be re-shipped to Calcutta. There is a copy of a telegram to this effect dated the 8th December, 1941 from the Agent of the defendant bank in Calcutta to the Indian Bank, Rangoon (Ex. 'C' P. 3). These documents show that the plaintiff reserved to itself the right of disposal of the goods until certain conditions were fulfilled.

Delivering the judgment of the Supreme Court in *Commercial of Income Tax, Macras vs. Mysore Chromite Ltd.*(1). S. R. Das, J. has observed that section 23 of the Indian Sale of goods Act lays down that where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. The requirement of the section is not only that there shall be appropriation of the goods to the contract but that such appropriation must

(1) A.I.R. (1955) S.C. 98.

be made unconditionally. This is further elaborated by section 25 which provides that where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such a case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled. Placing of the goods on board the steamer named by the buyer under a F.O.B. contract clearly discharges the contractual liability of the seller as seller and the delivery to the buyer is complete and the goods may thence forward be also at the risk of the buyer against which he may cover himself by taking out an insurance. 'Prima facie' such delivery of the goods to the buyer and the passing of the risk in respect of the goods from the seller to the buyer are strong indications as to the passing also of the property in the goods to the buyer but they are not decisive and may be negatived for under section 25 the seller may yet reserve to himself the right of disposal of goods until the fulfilment of certain conditions and thereby prevent the passing of property in the goods from him to the buyers.

In view of the principles enunciated above on the facts of this case it does not appear that property in the goods had passed from the plaintiff to its purchasers at Rangoon. The plaintiff, therefore, is entitled to maintain its claim for damages

As to the costs of this suit payable by the defendant No. 2. I intended to refer to Article 579 at page 318 of Halsburys Laws of England, 3rd Edition Vol. 30 which is *inter alia*, as follows:—

“When an action is properly and reasonably brought against two defendants as being liable jointly or in the alternative and judgment is recovered against one only, the unsuccessful defendant may be ordered to pay to the plaintiff the costs payable by him to the successful defendant to pay the costs of the successful defendant direct to that defendant.”

In this case even at the final stages of the hearing when arguments were advanced by counsel for the respective parties the two defendants were blaming each other. The case of the defendant No. 2 was that the defendant No. 1 did not make over to the defendant No. 2 the export licence which was returned for correction. The defendant No. 2 was contending, that on the 2nd February, 1942 the export licence was handed over to the Rangoon Agent of the defendant No. 2 and it was not given back to its Rangoon branch for correction. On analysing the evidence I have come to the conclusion that the case of the defendant No. 1 should be accepted. I have set out above the con-

tents of the relevant paragraphs in the two written statements particularly to indicate the nature of the dispute between the two defendants and their respective contentions. In this view of the matter the plaintiff was justified in making both the defendants parties to this action and proceeding against both of them till the very end (vide order 1 Rule 7 of the Code of Civil Procedure). The defendant No. 2 therefore, should be asked to bear the costs of the defendant No. 1 in addition to the costs of the plaintiff. I shall make this order especially in view of the interpolation of the pencil writing of Lacey on the letter of the 31st January, 1942 marked Exhibit O—1 which was not disclosed by the defendant No. 2 till the 23rd May 1945 only five days before Lacey's examination debene esse

In the result, therefore, there will be a decree in favour of the plaintiff against the defendant No. 2 for Rs. 8,646-77nP. and for interests at judgment @6% per annum. The suit is dismissed as against the defendant No. 1. The defendant No. 2 would pay to the plaintiff as well as to the defendant No. 1 their costs of this suit certified for two counsel.

N. C. S.

*Order accordingly.*

## ORIGINAL CIVIL

*Before the Hon'ble Mr. Justice Bijayesh Mukherji.*

SHEW PRASAD AGARWALLA

Vs.

ANIL GANGULY & ORS.

Civil

1963

February, 19.

*Indian Partnership Act, 1932 (Central Act IX of 1932), Section 4—Ingredients of partnership under—Sharing of losses, if such an ingredient—Partnership agreement, if in substance may be lease to defeat Calcutta Rent Ordinance, 1946 (Bengal Ordinance V of 1946)—Indian Evidence Act, 1872 (Central Act III of 1872), SS. 91, 92, it protect an agreement made in fraud of a statute—presumption of joint tenancy under English law, if applicable to partners.*

Sharing of losses is not one of the ingredients of partnership under Section 4 of the Indian Partnership Act, 1932, but sharing of profits is.

An agreement may be inform a partnership agreement, but in substance a lease in disguise to defeat the provisions of the Calcutta Rent Ordinance, 1946, prohibiting consent subletting of premises by tenants without the consent in writing of the landlords.

Such an agreement being in fraud of the statute, is not produced by Sections 91 and 92 of the Indian Evidence Act, 1872.

The presumption of English law that a transfer to more persons than one creates a joint tenancy with right of survivorship in the absence of words of severance, is not available in the case of persons who are partners.

The material facts will appear from the Judgment:—

B. C. Dutta with A. K. Bhattacharjee—for the Plaintiff.

S. K. Hazra with Arya Mitter—for the Deft. No. 1.

S. Tibrewalla with M. P. Posad—for the Deft. No. 2.

The Judgment of the Court was as follows:—

**Mukherji, J.:**—The Court: This is a suit by Shew Prosad Agarwalla and Kunj Behari Agarwalla Sons of late Hariram Agarwalla, for amongst others declarations that their tenancy in room No. 50, in the ground-floor of 201B, Mahatma Gandhi Road (formerly Harrison Road) subsists, that the creation of a tenancy therein for the second defendant, Gopiram Agarwalla, by the first defendant, the receiver in a certain suit of this Court, is a quality and that the partnership between their father, Hariram, and the aforesaid second defendant, Gopiram, entered into on or about September, 16, 1947 was dissolved on July 16, 1957 by service of a notice of that date failing which a decree by this court for dissolution. These declarations apart, two other reliefs they pray the Court for may be noticed; (i) *Khas* possession of room No 50 and (ii) a counting against the second defendant, Gopiram.

Originally long before the receiver had come to be appointed. Hariram and his "working partner", one Kartick Chandra Sil, were the tenants of the shop room in controversy on a monthly rent of Rs. 55/- according to the Hindi Calendar month. Kartick was not heard of since the Great Calcutta Killings of August 1946, presumably he left behind him surviving no heir. Hariram, however, continued the tenancy on regular payment of rent, becoming thereby, it is said, the sole tenant. The rents were paid so up to *Chaitra*, 2013 S.Y.. The rent for *Baisakh*, 2013 S.Y. tendered to the then receiver, it was refused. That only led Hariram to remit by money-order on July 10, 1956 the rents for *Baisakh* and *Jesth*, 2015 S.Y. The remittance met the same fate; refusal again. Thereupon the rents refused and the rents falling due subsequently were deposited with the rent controller.

What goes in the preceding paragraph is merely a paraphrase of the averments in the first two paragraphs of the plaint and calls for a digression. If rent was paid up to *Chaitra*, 2013 S.Y. how is it that the rent for *Baisakh*, 2013 S.Y. was tendered over again? Was the rent for *Baisakh*, 2014 S.Y., then tendered 2013 S.Y. in the second paragraph of the plaint having been a slip for 2014 S.Y.? No; to read the averment so will be to misread it and to betray a misconception, submits Mr. Dutt, the learned counsel for the plaintiffs, who amplifies the averment; rent was paid up to *Chaitra* of 2013 S.Y. to mean that it was paid up to *Chaitra* of 2012-13 S.Y.

To continue the narration of the case set out in the Plaint, Hariram died meanwhile on February 17, 1957. His sons, the two plaintiffs before me, repeated what their father had done: tender of the rent to the receiver, on his refusal remittance by money-order and that refused, deposit with the rent contröllor, why the receiver was behaving so was not disclosed.

This is one part of the plaintiffs' case. Another is: Gopiram started breaking the terms and conditions of the partnership he and Hariram had commenced on September 16, 1947 or thereabouts a partnership by virtue of which both were carrying on business in cloth in the disputed shop room. Gopiram stopped paying Hariram his remuneration of the firm sum of Rs. 100/- a month fixed by the deed of partnership. Worse still, he prevailed upon the receiver to get the rent bills for the shop aforesaid "in the name of his new concern". This sort of infraction brought about the partnership's dissolution by a notice dated July 16, 1957 by the plaintiffs. More by the same notice Gopiram was asked to quit the shop room which in collusion with the receiver, and with his connivance too, Gopiram has been continuing in possession of. He also failed to give accounts the demand for which yielded little result.

This then is a brief outline of facts which led the plaintiffs to institute the suit, first in the the city civil court (Suit No. 495 of 1958 on October 7, 1958) and then in this Court on August 3, 1960, the city court having returned the plaint the same day, to wit, on August 3, 1960 on the ground of its pecuniary jurisdiction having been exceeded: *vide* Order No 27 dated August 2, 1960. The order of the city court's register on the back of the plaint returned and annexed to the plaint presented to this Court shows as much.

Both the defendants the receiver and Gopiram, resist the suit on more please than one; (i) multifariousness, (ii) non-maintainability, (iii) dental of Hariram having become the sole tenant (iv) the real relation between Hariram and Gopiram having been that of lessor and lessee instead of partners and (v) Gopiram having been a direct tenant under the head-lessor, the receiver, in accordance with law

The parties go to trial on seven issues including an additional issue.

1. Is the suit bad for multifariousness?
2. Is the suit maintainable in its present form?
3. Did Hariram Agarwalla become the sole tenant as respects the shop room in controversy?

4. What was the real relation between the said Hariram Agarwalla and Gopiram Agarwalla, the second defendant that of partners or that of lessor and lessee?

5. Did the second defendant become a direct tenant, if at all, under the head-lessor in collusion with the receiver, the first defendant, as alleged?

Additional issue:—

1. Is the instant suit barred by limitation under article 106 of the first schedule to the Limitation Act 9 of 1908.

The determination of the fourth issue, which I take up first, turns on a true construction of what has been called the agreement of partnership, exhibit A: also incorporated at pages 1—3 of the brief of documents most of which are admitted for the purpose of doing away with formal proof. The introductory parts of the agreement include the date of the deed: September 15, 1947—a date which is reiterated in its testimonium—though the signature of one witness to the instrument, Padmakar Chaturvedy, is dated September 16, 1947, the names of the parties: Hariram “of the one part” and Gopiram “of the other part,” and two recitals. One is that the first party Hariram is a tenant of the shop room in controversy paying Rs. 55/- a month to his landlords Sadasukh Gambhirchand Bulakidas—owners of premises No. 201 Harrison Road, Calcutta, which he took on rent for the purpose of carrying on business.” The other is that the second party Hariram in piecegoods as partners, Gopiram being “the actual partner” and Hariram “a sleeping partners.” Gopiram is to carry on the business under the style of Bijoy Kumar Agarwalla, the name of his only son then. This sort of introduction over, are listed the clauses, nine in all, on the basis of which both parties have agreed between themselves to carry on business in the disputed shop room. Gopiram shall pay Hariram Rs. 100/- “monthly on account of his fixed remuneration from the business” by the seventh day of the next month failing which Hariram has the option to terminate the agreement, to sever connexions with Gopiram and to take any other partner with a view to carrying on any other business in the shop room (clauses 1 and 9). All profits will accrue to Gopiram none to Hariram who is not by Hariram who “will not be liable for any loss” (clauses 3 and 5). “The management of the business and the capital money to be invested in the business will solely belong to” Gopiram in whose name “all dealings in the market will be” (clauses 4 and 6). For the rent of the shop room (which comes to Rs. 55/- a month) Hariram will be, and Gopiram will not be, liable the rent will continuing to run in the name of Hariram, the one “solely reasonable for the rent” (clause 2 and 7). The remaining clause is the eighth one which provides for a deposit of Rs. 200/- by Gopiram as security for “performance of the contract” and also for meeting any liability with which Hariram may be first for the loss of the business or for his association with Gopiram.

This then is the agreement of partnership. I read it as a whole as I must. And I ask myself: do I see in it what section 4 of the Partnership Act, 1932 bears.

“Partnership” is the relation between persons who have agreed to share the profits of a business carried on by all or are of them acting for all?

An at present is there between Hariram and Gopiram. More the business is to be carried by Gopiram alone with Hariram as the sleeping partner.” In other words, Gopiram acts for Hariram. So the two elements of partnership are discernible, if (and this is a big ‘if’ to which I shall come later) the agreement of partnership is taken at its face value. But what about the other element that of sharing the profits in absence of which there can be no partnership? Let the clauses in the agreement of partnership answer it:

1. That the first party (Hariram) will only get Rs. 100/- *from the second party* (Gopiram) monthly on account of his fixed remuneration *from the business*.

3. That *all* profits and loss of the business will accrue to and be paid by the second party.

5. That the first party will not be liable for any loss nor will be entitled to any profit.

The italics are mine. The plain language, it has been provided that Hariram is not entitled to *any* profit; *all* profits accruing to Gopiram. Mr. Dutt submits, and rightly too, that clauses 3 and 5 cannot be abstracted from the rest of the instrument. He therefore reads together the three clauses reproduced above, emphasizes the words ‘from the business’ in clause 1, and contends that the meaning is clear enough: Hariram will not get any profit save Rs. 100/- as his fixed remuneration *from the business*. If that is so, Mr. Dutt concluded, here is the sharing of the profits between Hariram and Gopiram. No doubt, “partners can agree to share profits in any way they like. They may agree to share them equally. They may also agree that one partner is to receive a fixed annual or monthly sum in lieu of a sum varying in accordance with the profits actually earned”, to quote, excising the words not needed, from the judgment of Marten, C.J. in *Raghuveer v. Hormusji Bezanji Ramji*(1), a case Mr. Dutt cited. But there two experienced solicitors of the Bombay High Court entered into a formal agreement to become partners, one agreeing to be said Rs. 500/- a month “in lieu of his share of profits”—words which I miss so much in the agreement of

(1) A.I.R. (1927) Bom. 187—189.

partnership before me, words which I cannot equate with the words I find here: from the business, assuming them to be no-camouflage. (More of which hereafter) Still less can I equate Hariram and Gopiram with two seasoned solicitors. That apart, the sharing of the profits presupposes existence of the profits. No profits, no sharing thereof. So the three clauses—1, 3 and 5—Mr. Dutt reads together (and I too) really come to this: profits or to profits, Hariram must get the fixed remuneration of Rs. 100/- a month from the second party (Gopiram) who is thus personally liable to pay it. The words 'from the business' therefore neither do away with the personal liability of Gopiram nor make it a payment from the profits. Gopiram must pay Hariram his, month by month, whether or no the business earns profits. To pay so is far from saying that Hariram and Gopiram share the profits. The correct diction to use, in the wake of the agreement of partnership: clauses 1, 3 and 5, will be that Gopiram alone gets all profits burdened with the personal liability to pay Hariram Rs. 100/- a month even when no profits accrue and that Hariram is not entitled to and does not get "any profit."

The two other cases Mr. Dutt refers me to on this point appear to be distinguishable in a like manner, the profits being specially mentioned in each and thus carrying the mark of a partnership. *Raghumull Khandelwal v. The official assignee of Calcutta and others*(1), turns on the construction of a memorandum of co-partnership agreement which by its fifth and sixth clauses provide for two things: one, Dorian Evans will get Rs. 500/- a month as his remuneration over and above 10% as commission on the net profit of the business and he will get no shares of profit of the firm, and two, Raghumull will get 12 annas, H. C. Ghosh 2½ annas and D. N. Sircar 1½ annas shares (thus exhausting 16 annas) in the profits of the business. The appeal court consisting of Sir Lancelot Sanderson, Chief Justice, Sir Ashutosh Mookerjee and Sir Nalini Ranjan Chatterjee hold Dorian Evans to be a partner, and not a servant, putting an emphasis on, among other things, the commission of 10% issuing from the profits. The Chief Justice observes at page 43:

"In my judgment, it is clear that the 10 per cent was to be paid to Dorian Evans out of the net profits of the business when they were ascertained, and although the words "as commission" are used in the agreement, the 10 per cent, which was to be received by Mr. Dorian Evans was a share of profits within the meaning of section 239 of the Contract Act."

Sir Asutosh Mookerjee observes at page 45:

"It is urged that as the 10 per cent of the profits was to be paid as commission, this was not a share in the profits within the meaning of

(1) (1923) 28 C.W.N 34.

section 239. I do not think that the contention is well-founded. The expression "shares of the profits" is simple and a narrow construction ought not to be put on it."

Sir Nalini Ranjan Chatterjee observes at the same page:

"The expression "a share of the profits" is not defined in the section, and I think there is no sufficient reason for holding that payment of 10 per cent. on the net profits is not a share of the profits."

Then in the context of the whole of the document, the recital in the fifth clauses that Dorian Evans shall get no shares of profit is interpreted to mean that he is to get no share other than the share already provided for, namely, a remuneration of Rs. 500/- a month and a commission of 10% on the net profits. And much the most important part of this context is furnished by clauses 23 which provides that should H. C. Ghosh and Dorian Evans, two whole time working partners, break the provisions of the memorandum, do an act of bankruptcy, become physically unfit, commit a criminal offence etc., the capitalist partner Raghunull might by notice in writing determine the partnership. A clause as that leads Sri Asutosh Mookerjee to observe:

"To my mind it is inconceivable that if Evans had been a mere Manager, the partners should have ever contemplated that this result would follow merely because he became physically unfit to attend to the business or committed an act of bankruptcy."

Thus, this case is of little help to Mr. Dutt. Other *indicia* of partnership apart, Dorian Evans does not get merely a fixed remuneration of Rs. 500/- a month. He gets over and above that 10% as commission on the net profits and therefore shares the profits—a fact which cannot be said of Hariram. In his Rs. 100/- a month Mr. Dutt sees restriction of profits. I see however nothing like any profit anywhere. I have stated why.

Equally unhelpful is *Kundanmal and another v. Madan Gopal*(1), the other case Mr. Dutt cites. There the clear stipulation was that the suing partner was entitled to Rs. 50/- a month *by way of profits* from the partners sued against. So the sharing of the profits was patent. Here what is patent is that all profits go to Gopiram and none to Hariram who mulcts Gopiram in a liability of Rs. 100/- a month irrespective of profits. That negates the sharing of the profits.

On materials I have traversed so far, it can be found that the element of the sharing of the profits is lacking here. So the partnership the plaintiffs

(1) A.I.R. (1956) Hyderabad 27.

contend for is lacking too. But there are various other materials to go by; no less other clauses of the agreement of partnership. What happens if Gopiram fails to pay Hariram Rs. 100/- a month? And he has to pay this "on or before the 7th of the next month", as is stated in the 9th clause which answers too the question I have asked:

" . . . . . on failure of compliance this agreement will fall through at the option of the first party and the first party will be entitled to sever his connection with the second party and take any other partner and carry on any other business in the said room.

What is it I read in this clause—a *bona fide* stipulation in an agreement of partnership? Gopiram fails to pay Hariram on or before the seventh day of the next month. Hariram may then put an end to the agreement sever his connexion with Gopiram, take any other partner and carry on another business in that very room. That is to say, a breach by Gopiram of the express condition that he must pay Hariram Rs. 100/- a month on or before the seventh day of the next month is followed by a provision which enables Hariram to evict Gopiram from the room and to do any other business there on his own.

The remaining clauses now call attention. For the rent of Rs. 55/- a month for the shop room to the owner, Hariram in whose name the rent bills will run is answerable—not Gopiram (clauses 2 and 7). Hariram thus makes a monthly profit of Rs. 45/- a month: Rs. 100/- he receives *minus* Rs. 55/- he pays, as Mr Tibrewall, the learned counsel for Gopiram, rightly contends. And it is really Gopiram's business, though the veneer of partnership has been thrown on the introductory recitals and here and there. The management of the business is exclusively his. The capital money invested solely belongs to him (clause 4). The market knows him and him alone. Because all dealings are in his name (clause 6). And he deposits Rs. 200/- with Hariram as security for the performance of the contract and for making good any loss Hariram may run into on account of debts of the business and like (clause 6). The concluding portion of this clause looks like a disguise and an idle aversion too when Hariram has taken so much pains in the preceeding clauses to keep himself away from any liability and loss and from the market too. Disguise removed, it appears to be really a deposit in advance of two months' rent: Rs. 200/-. Thus the document read as a whole and looked into a little below the surface reveals *inter alia* a fixed payment of Rs. 100/- a month which is but another name for rent, keeping a margin of Rs. 45/- a month for Hariram, no sharing of profits, an advance deposit of Rs. 200/- as two months' rent, and a forfeiture clause in clause 9, all so consistent with a lease which masquerades here as an agreement of partnership.

Why this sort of a subterfuge? The date of the agreement of partnership is a day in the middle of September, 1947: 15th or 16th. It does not matter which. The Calcutta Rent Ordinance, 5 of 1946, was then the law, having come into force on October 1, 1946. Without the consent in writing of the landlord and in absence of a contract to the contrary, the sub-letting of the shop room in September, 1947 had its peril in eviction [section 12(b) *ibid*]. For all I see, Hariram had not the consent in writing of the landlord and there was no contract to the contrary either. So a naked subletting Hariram could not go in for. Instead he had to resort to a sham agreement of partnership (qq. 215—217 to Gopiram). This then appears to be the reason for the document I see before me.

Mr. Dutt catalogues in vain a number of facts to establish partnership. I deal with them seriatim:

- (i) True it is that Hariram and Kartick did business in this very shop room as partners. But that does not mean that on Kartick's disappearance Hariram and Gopiram must have done business too as partners.
- (ii) Nor does an inference of partnership follow from the shop room remaining vacant for some seven or eight months after Kartick was heard or seen no more.
- (iii) Bijoy Kumar Agarwalla in whose name Gopiram was carrying on business in the shop room was assessed as a dealer in cloth to a trade tax on August 16, 1948 by the Corporation of Calcutta, as is evidenced by an extract from the relevant register, exhibit E. This may not fit with the evidence of Gopiram that he started his business in the shop room in 1950 (qq. 3, 34, 35, 57 and 135). But he was acting as a broker in cloth and fending for himself all these years. Not that he was doing nothing and only counting Rs 100/- a month for Hariram (qq. 238, 243 and 244). Then, the issue of a trade license or the levy of a trade tax for a shop room in the hub of commerce which Mahatma Gandhi Road is does not necessarily connote the running of the business from the very date of the license being issued or the tax being assessed. As Gopiram rightly explains in answer to question No. 251, sitting in a shop over there you have to have a license, business or no business. The Corporation of Calcutta will catch you. And the business of a broker in cloth was there, though the business as a dealer in cloth was not because of government control (qq. 242 and 243). However all that may be, no partnership is revealed thereby.

(iv) Non-production of accounting books for 1947-50; when the cloth business did not get going, is only to be expected (q. 58 to Gopiram). Not so, however, the books for 1950-1952 non-production of which is attributed to having been lost (qq. 59-62, 271-276). Gopiram's evidence satisfies me of the loss he speaks about. Then, it is worth remembering that, "loss can never be proved absolutely", as Lord Thankerton observes in *Basant Singh and others v. Rrij Raj Saran Singh and others*(1). Indeed, could that be done, there would have been seldom a loss. When I lose a thing, I mean it is mislaid. And I do not know where it is or has gone. If I can say exactly when, where and in what circumstances I lost a thing, in all likelihood I would not have lost it. I therefore see nothing unworthy of credence in Gopiram's evidence. Assuming what he says is apt to produce disbelief, I shall not draw a presumption adverse to Gopiram. I shall not, because section 114 of the Evidence Act prescribes that the court may presume a fact. Not that the court must. Again, the suggestion to Gopiram is that he with the help of his father had "cooked" the subsequent accounting books, exhibits 0/4 to 0/10 and the like (q. 306). If the suggestion has any merit in it—I am clear, it has not—nothing was easier for Gopiram than to press his father into service for the earlier accounting books as well. So that way too, it is difficult to find partnership.

(v) The attempt to spell out partnership from Hariram's tenancy of the shop room being regarded as his contribution to the business looks singularly unattractive. In this attempt one sees the application of the old definition of partnership in section 239 of the Contract Act, 9, of 1872:

"Partnership is the relation which subsists between persons who have agreed to combine their property, labour or skill in some business, and to share the profits thereof between them."

But the proper section to be applied is section 4 of the Partnership Act, 9 of 1932, which does not require contribution to a business as an ingredient of partnership. That may come under section 6 *ibid* which must be read with section 4. But all relevant facts taken together go to show a sub-lease of the shop room by Hariram to Gopiram and not partnership between the two. To add to this, Mr. Tibrewall has a point when he contends that the definition of lease being what it is (section 105 of the Transfer of Property Act 4 of 1882), contribution by Hariram of his tenancy of the shop room means transfer

(1) (1935) 62 I.A. 180; 39 C.W.N. 1057; A.I.R. (1935) P.C. 132.

by him of his right to enjoy the room in consideration of money to be rendered periodically to him (Rs. 100/- a month) by Gopiram who accepts the transfer of such terms and is therefore a lease.

Mr. Dutt then contends that the agreement of partnership on the face of it shows business in piece-goods and partnership therein. He therefore asks me to reject under sections 91 and 92 of the Evidence Act 1 of 1872, the oral evidence to the contrary. But I cannot do so for more reasons than one. In the first place, the rule of exclusion of oral by documentary evidence which these two sections embody rules a case where there has been, in fact, a contract between the parties. It does not rule a case where (as here) there has been no agreement or contract founding a partnership. What professes to be an agreement of partnership is found in reality to be a lease. In the second place, the document under consideration now is a fraud on the Calcutta Rent Ordinance, 5 of 1946, and the fact that it is so bringing the transaction it records on the edge of the law may be proved by extrinsic evidence [proviso (1) to section 92 *ibid*]. In the third place, in determining whether or not Hariram and Gopiram had been partners regard shall be had to the real relation between them, as shown by all relevant facts taken together (section 6 of the Partnership Act, 9 of 1932). So it is incumbent upon me to weigh all relevant facts—an expression which includes all surrounding circumstances too. Not to do so is to regard recitals in a deed about partners and partnership as sacrosanct and conclusive, thereby shirking the determination in terms of section 6 *ibid* of the real relation between the parties. I therefore reject Mr. Dutt's contention resting on sections 91 and 92 of the Evidence Act.

Equally barren is Mr. Dutt's contention that even though partnership may fail a lease does not rear its head here. It does. The construction I have endeavoured to make of the agreement of partnership points to a lease. No doubt, rent receipts in a lease are ordinarily to be expected. But here it has not been an open lease. It has been instead an agreement of partnership hiding a lease. So rent receipts must be in hiding too. By granting rent receipts Hariram cannot undo what he had done by the so-called agreement of partnership. To attribute such an act to him is to insult his intelligence. Gopiram's evidence that Hariram signed on the back of another original agreement of partnership which Gopiram had with him and lost during the carriage of the litigation in the city court is deserving of criticism Mr. Dutt makes. If there are two originals, it is but common sense that one will be signed by Hariram and another by Gopiram—just as Dindyal, the first witness of the plaintiffs, says (q. 39), Gopiram saying the opposite (qq. 180, 181 and 186). Gopiram's testimony on the loss of the other original must draw largely on my belief in absence of further and better evidence. But nothing can turn on all this. Even if Hariram's signed acknowledgments of payments of Rs. 100 a month had been forthcoming, it is there to be seen that the said acknow-

edgments would not have proclaimed receipt of the amounts as rent. So the case in hand is such that absence of rent receipts simpliciter does not alter its fortunes one way or the other. More, the case is such that absence of rent receipts is only a normal thing to be expected here. Certainly it is not the plaintiffs' case that Hariram received no payments since September, 1947. Again, Gopiram's accounting books—such as have been produced from 1952—enter payments to Hariram as rent. These entries are Gopiram's own uninhibited by the agreement of partnership or Hariram and may therefore taken as having recorded true facts. I believe these accounting books and the oral evidence of Gopiram touching them, even though Gopiram's father has not been examined—which Mr. Dutt makes a point of. Had he been examined, he would have been Gopiram's father all the same. I hold too that non-production of the earlier accounting books has been explained to my satisfaction. The payment by Gopiram of charges for consumption of electricity to Hariram, the meter standing in his name, has nothing abnormal in it. And a charge as that must necessarily vary from month to month, nothing to say of the fact that one in the position of Gopiram has of necessity to be at the mercy of Hariram having the meter in his name. So all this is one more indication of the agreement of partnership being in reality a lease.

Non-disclosure of Gopiram's banking account with the Punjab National Bank—disclosure has been made of his account with Hindusthan Mercantile Bank showing receipt by Hariram of Gopiram's cheque, Ext. 0/12, for Rs. 314—has been commented upon. But there have been no transactions there (q. 264 to Gopiram). So he is within his rights not to make the disclosure. Mr. Dutt complains of *See Bilas Kumar v. Desraj Runjit Singh*(1).

The evidence of Din Dayal and Kunj Behari (himself one of the two plaintiffs) does not count. Because none have any personal knowledge about the partnership which is now sought to be bolstered up (qq. 228 and 229 among others to Din Dayal and qq. 94 and 95 to Kunj Behari). Din Dayal has impressed me as a poor type given to reckless glibness, so much so that in payment of extra amounts on account of charges for consumption of electricity by Gopiram to Hariram in whose name has been the meter, he sees profit or additional profit (qq. 257—261), overlooking the recital in the agreement of partnership that all Hariram is entitled to is a fixed sum of Rs. 100 a month by way of so-called profit. The evidence of Gopiram, on the other hand rings true. His was no choice—either to take the shop on Hariram's terms (the so-called partnership) or not at all (qq. 227, 228 and 233).

Mr. Hazra the learned counsel for the receiver defendant, seeks to strike down the agreement of partnership as not a document of partnership on the

(1) (1915) 42 I.A. 202-206.

ground that Hariṛam shares no loss. But sharing losses is not one of the ingredients of partnership section 4 of the Partnership Act prescribes. Sharing profits is *M. P. Davis v. Commissioner of Agricultural Income Tax*(1), Mr. Hazra cites in support of his contention, does not lay down anything to the contrary. There M. P. Davis was the registered owner of the Kaimobetta coffee estate prior to the assessment year 1952-1953 when he claimed a change of status grounded on partnership between him and his brother resting on a partnership deed. But it was only a dodge to evade tax as the owner,—a conclusion come to on the basis of all relevant facts taken together, such as: one, he claimed loss of the previous year and full expenses of the accounting year against what he had actually received during the accounting year 1951-52; two, the accounting books did not show a change in the management of the estate in spite of the agreement; three the brother, the purported partner, could not charge, encumber or in any manner deal with the capital of the firm, the Kaimabetta estate, the property of M. P. Davis, who would get it back on dissolution; four, the brother could not contribute anything to the capital; five, clear indications there were to show M. P. Davis to be the master and his brother to be the servant, and six, the brother was to get his remuneration out of the profits and no remuneration if there was loss. In this context, it was held that sharing profits would not of itself make a partnership and that what was missed was a provision as to how losses were to be dealt with. Not that it was held: no sharing of losses, no partnership. I cannot therefore hold what Mr. Hazra asks me to.

To sum up, here is a tenant Hariṛam who with a view to jumping the Rent Ordinance's provision tabooing by implication subletting goes in for a so-called partnership with the sub-tenant Gopiram whom he inducts into his leasehold, the shop room. He secures for him a monthly payment of a firm sum of Rs. 100 by Gopiram from the business and, on default, Gopiram's eviction and his own re-entry. All he is concerned with is this. He has taken the additional precaution of keeping two months' dues (Rs. 200) in advance as security. The business is not his. The management is not his either. He earns neither profit nor loss. Such a one can be called the partner only by stretching of terms that will convert black into white. The generous assumption I have made in favour of the plaintiffs earlier in this judgment that on the face of it the agreement of partnership evinces agreement and mutuality—cannot hold any longer. In view of all that goes before the recitals to that end in the agreement cannot be taken at their face value. They are simulate. I therefore find lack of partnership not only because of lack of sharing of profits but also because of lack of a genuine agreement and real mutuality. Accordingly, I find the fourth issue in favour of the defendants.

(1) A.I.R. (1959) S.C. 719.

I now proceed to consider the fifth issue the burden of which whether or no Gopiram become on or about July 4, 1956 a direct tenant under the receiver defendant as the result of collusion between the two. The relevant document creating the tenancy is exhibit O/16. The plaintiff stands on partnership and breach of the terms thereof. That that claim is found on evidence and at law to be bad is another matter. One of the terms Gopiram is alleged to have broken is that he prevailed upon the receiver to get the rent bills of the shop in controversy in his name [paragraph 6(b) of the plaint]. The first relief the plaintiffs therefore pray the court for is a declaration that the creation of the tenancy in the said shop room in Gopiram's favour is a nullity. The averment in the ninth paragraph of the plaint refers *inter alia* to collusion between the two defendants. The first defendant the receiver, traverses such allegations in paragraphs 8 and 11 of his written statement. The pith of these paragraphs is a denial of the allegations traversed, coupled with an assertion that Gopiram became a direct tenant the details whereof are set out in paragraph 2 preceding: under section 16(2) of the West Bengal Premises Tenancy Act 12 of 1956, (shortened hereafter into the Act) Gopiram was elevated to be a direct tenant on receipt of appropriate notices from both parties—Hariram and Kartick, the tenants of the first degree, and Gopiram, the tenant of the second degree. Gopiram, the second defendant, traverses the allegations in the plaint in a like manner in paragraphs 6 and 9 of his written statement. In this state of the pleadings the material proposition—a mixed one—of fact and law of Gopiram becoming a direct tenant under the receiver, and if so, in collusion of the one with the other is affirmed by the plaintiffs and denied by the defendants. An issue therefore arises. And this is why the fifth issue I am now discussing has been struck after an elaborate opening and adequate address by the learned counsel appearing for all the parties, none objecting to the issue having been cast in the manner it has been. Therefore, Mr. Tibrewall's contention that this issue does not arise from the pleadings appear not to be arguable even. It does arise. I hold so.

The Act came into force on March 31, 1956. On or about June 18, 1956 Gopiram did notify the landlord of his subtenancy and, on termination thereof, his right to be recognized as a direct tenant. Exhibit O/15 is the relevant notice on behalf of Messrs. Bijay Kumar Ajay, Kumar who are Gopiram's sons and after whose names he runs the business. The date of creation or termination of the subtenancy is not in the notice, as it should have been, in terms of rule 4 of the West Bengal Premises Tenancy Rules, 1956. But that need not be made much of and has not been made a point of even. Because the rule is directory. And substantial compliance suffices (*Sm. Krishna Debi v. Shalimar Paint Colour and Vernish Co. (P) Ltd. and others*(1), *Messrs. Bengal Wire Nails Co. (P) Ltd. v. Jagmohandas Mundra and others*(2), and *Dilip Narayan Roy Chowdhury v. Amarendra Kumar Dutta*(3)). So Gopiram's

(1) (1960) 67 C.W.N. 272. (2) (1962) 67 C.W.N. 275. (3) (1959) 64 C.W.N. 284.

notice stands. Does the notice dated June 22, 1956 on behalf of Hariram and Kartick stand too? That is much the most important point for decision. Exhibit 1 is the notice over the signature of Shri Sisir Kumar Basu, a solicitor, whom the receiver defendant examines as his witness. "Under instructions from and on behalf of my clients Messrs. Hariram Agarwalla and Kartick Chandra Seal of 201B, Harrison Road, Calcutta" he notifies the receiver of the subtenancy of Gopiram and notifies too that his clients have no objection "if you accept the said subtenant as a direct tenant under you in respect of the aforesaid shop room." But it is clear from Shri Basu's evidence which makes a sorry reading, that he had received no instructions direct either from Hariram or from Kartick. He had received instructions from an agent instead (qq. 7 and 8). What the name of the agent is he does not recollect. (q. 36). The relevant day book he has not with him (q. 35). A client is supposed to have introduced the agent to him. But Sri Basu does not remember his name either (q. 38). Sri Basu appreciates now (as he says) the importance of the letter he had addressed to the receiver and the far-reaching effects it would produce. Still he did not think it necessary to be satisfied about the authority of an agent as that (qq. 39-43). I find it difficult to speak with becoming restraint about a solicitor's work showing this sort of scamping and worse. More, I disbelieve his story about an agent, though it pains me to do so. Even if I believe him, his evidence does not prove that either Hariram or Kartick had ever authorised him through an agent to address the letter he did to the receiver. It is all very well for Gopiram, to say that Hariram far from raising any objection to his becoming a direct tenant had asked him to see the landlord and to write to him mentioning the names of Hariram and Kartick (qq. 149-150) or that Hariram promised to send a letter to the receiver and had confessed having sent it, asking Gopiram at the same time to see the receiver with a view to getting the tenancy transferred in his favour (qq. 369-371). Nothing I imagine, is easier than to attribute this statement or that to a dead man who will not come back to life to give a denial or his version. It is against human nature to part with a valuable tenancy right at Mahatma Gandhi Road in this manner unless one is compelled to do so by the coercive process of law. No doubt, section 16 of the Act is there with a view to eliminating middlemen and their profits. But you cannot do away with a middleman by committing fraud on section 16 through a sham notice I see here.

Mr. Tibrewall seeks to get round this ugly manifestation in two ways. First: lack of Shri Basu's authority to write the letter he did to the receiver has neither been pleaded nor proved going by the rule of *onus*. Second: Hariram ratified what Shri Basu had done.

How the issue under discussion now arises has been noticed. The plaintiffs do not examine Sri Basu. The receiver defendant does, only to show

how he had accepted Gopiram as his direct tenant so as to rid himself of the allegation of collusion and the like. And the evidence of such a one becomes a revelation. A shady deal there has been for all to see. But who amongst the parties makes the deal cannot be found with certainty upon evidence. Suspicion there may be. But suspicion is not proof. That apart, the plaintiffs' suit rests on partnership and breach of the terms thereof. By breaking one of the terms Gopiram gets the rent bills in his name—which means that he comes a direct tenant. What more has to be pleaded? Surely not evidence. And the evidence have comes from the opposite camp, making the truth out; a faked notice on behalf of Hariram. Lack of authority of Sri Basu is so patent upon his evidence that the question of onus—be it of proving a negative in the first instance—becomes of an academic interest. To put it another way, the receiver defendant has discharged the plaintiffs' onus, unwittingly though, by examining Sri Basu whose evidence appears to be illuminating on this point. Again, it is just like the defendant's answering that plaintiffs' allegation (your direct tenancy is a nullity) with the plea: no, it is not; the direct tenancy is quite in conformity with law. Hence the onus is not so one-sided either as is imagined to be. Judged so, little assistance is derived from what Mr. Tibrewall cites: *Moshuq Ali and others v. Hurunissa and another*(1). (where the custom pleaded by the plaintiffs that the widow gets only life interest in the husband's estate and the custom pleaded by the defendants that the widow succeeds as a full owner were considered as a whole, and not piecemeal). *Mr. Krishnaswami Naidu v. Secretary of State*(2), (which cast upon the suing government the initial onus to prove a negative fact, namely, total failure of heirs of the last owner whose properly government claims by escheat) and *Kalyanpur Lime Works Ltd. v. State of Bihar and another*(3), (where the defendant, only denying the contract in his written statement, is not allowed to assail its legality, Order 6, rule 8 of the Procedure Code clinching the matter). Then it is said that lack of authority is a material fact to be pleaded in the plaint on the basis of the meaning of cause of action as explained in *Haramoni Dassi and others v. Hari Churn Chowdhury*(4), and *Sher Ali Mridha v. Torap Ali and other*(5). Such an approach rests on an inadequate appreciation of the pleadings. The Plaint on this point comes to this: Gopiram, a partner, bound to make room for Hariram on a certain contingency does not do so but installs him as a direct tenant. Nothing more has to be pleaded. The defence on this point is: Gopiram is a direct tenant in accordance with law. Hence authority or lack of authority of Sri Basu to make the direct tenancy legal or illegal comes as a matter of course. Thus the first point Mr Tibrewall urges upon me falls. So does the second point. Quiescence, if that is not acquiescence in the context of facts here. 1956—

(1) A.I.R. (1929) Oudh, 204.

(3) A.I.R. (1954) S.C. 165.

(5) A.I.R. (1942) Calcutta 407.

(2) A.I.R. (1943) Mad, 15

(4) L.L.R. (1895) 22 Cal. 833.

when Hariram was thrown over board by questionable means—to 1958—when his sons raised their suit or suits in the city court—is two years or a little more. You cannot expect a man to make a bee-line for the nearest court as soon as his rights are invaded upon. I miss too a full knowledge of facts upon which acquiescence must rest. So Mr. Tibrewall cites in vain sections 196 and 197 of the Contract Act, 9 of 1872, section 198 of which deserves to be taken into reckoning as well.

*In Hanuman Chamber of Commerce Ltd., Delhi v. Jassa Ram Hiranand*(1), cited by Mr. Tibrewall, there having been a reference to arbitration by one partner, acquiescence on the part of the non-referring partners, the firm being the plaintiff was inferred from certain telling circumstances: (i) for some three months they raised no objection—not even any time beyond that; (ii) the arbitration reduced their claim from Rs. 49,481-7-9 to Rs. 18,187-13-9, none objecting all the same and (iii) the defendant who raised the plea of an incompetent reference to arbitration led no evidence to show that the non-referring partners did not accept the act of the referring partner. To find anything like this in the case before me is an impossible task. Ever since the refusal of rent by the receiver, Hariram—and after his death—his two sons, the plaintiffs, have been doing all they can to uphold their tenancy by remitting rent by money-order, by depositing it with the rent controller and by being otherwise 'up and about'.

The conclusion I have therefore come to is that Gopiram did never become a direct tenant under the receiver who, on materials I have had put before me, is not, however, open to the charge of collusion. He, it seems, was as a victim to collusion instead. I find the fifth issue so.

The third issue, to which I now turn, arises because originally the tenancy of the shop room No. 50 at 201B Mahatma Gandhi Road—the one in controversy—was in the names of the Hariram and Kartick. The evidence led on behalf of the plaintiffs is that Kartick has not been heard of since the Great Calcutta Killings of August, 1946. Gopiram examines one Madan Mohan Das supposed to be in occupation of shop room No. 51 at 201B, Mahatma Gandhi Road in order to prove that Kartick is still alive. Indeed, the witness deposing on December 20, 1962 saw Kartick alive on Monday preceding, that is, on December 17, 1962 at Rajbalhat bazar. Madan and Kartick, it is said, belong to the same village: Rajbalhat.

Madan has impressed me as a witness of untruth. As he steps into the witness box, he gives out his father's name as Late Srihari Charan Das. Cross-examined, he names Upendra Chandra Das as his father. Asked to

(1) A.I.R. (1949) E.P. 46.

explain this, he says that Srihari is his grandfather's name and that he gave both the names—which, of course, is not true. This amazing impudence apart, he had never any talk with Gopiram, his next door shop-keeper, as to on what line his evidence would be. Another untruth. Again, according to him, first Kartick had the shop No. 50 all to himself. After 2 or 3 years he took a partner, a Marwari, whose name he does not know. Then he explains that he does not remember the name after such a long time. Last he rounds off his evidence by saying that Kartick went away relinquishing the business. All this has only to be stated in order to be rejected.

To hold so, however, is not to solve the problem of Kartick being alive or dead. No doubt, Hariram, his partner, is the person who would naturally have heard of him if he had been alive after August, 1946 as Mr. Dutt contends. But Hariram cannot be equated with Din Dayal and Kunj Behari. This is what I weigh in my mind. I weigh too, as submitted by Mr. Hazra and Mr. Tibrewall, the affidavit sworn to by Hariram on July 30, 1956 before the rent controller (P.D. 8 at page 20 of the brief of documents) where he affirms from his knowledge that he is the representative of Kartick and also:

"I state that I and Sri Kartick Chandra Seal are monthly joint tenants according to Hindi calendar under the landlord opposite party (the receiver) with respect to room No. 50 g.f. (ground floor) in premises No. 201B Harrison Road, Calcutta at a monthly rent of Rs. 55."

Do I see in such an affirmation of Hariram true to his knowledge a dead Kartick? I see the opposite: a living Kartick on July 30, 1956. Mr. Dutt contends that this cannot be regarded as an admission of Kartick being alive. What is it then? If language has any meaning, when I say *A* and I are tenant and I represent him, I mean that *A* and I are alive. Surely I do not put forward a dead man as a tenant and I do not represent a dead man either. I therefore treat Hariram's affidavit as his admission that Kartick is alive. Nothing that I read in the oral evidence led on behalf of the plaintiffs explains this admission and takes away from the solemnity of this affidavit which is followed by deposit of rent with the rent controller for months in the names of both: Hariram and Kartick (P.D. 10: the series of *challans* at pages 26-37 of the brief of documents). This being the state of evidence and Kartick having been alive on July 30, 1956 even on Hariram's admission, section 108 of the Evidence Act Mr. Dutt relies upon is ruled out and section 107 thereof Mr. Tibrewall refers to is attracted, casting the burden of proving Kartick's death on the plaintiffs—a burden which remains undischarged. That being so, Hariram, only because he pays the rent, cannot convert himself into the sole tenant.

There is another pertinent consideration Mr. Hazra raises. The presumption of English law that a transfer to more persons than one creates a joint tenancy with right of survivorship in absence of words of severance is not available to the plaintiffs. The presumption here is the other way about: a tenancy in common. So even assuming Kartick to be dead—though that will be an assumption unwarranted by evidence—his heirs share the tenancy in common with Hariram. Upon evidence as it stands, it is impossible to hold that his heirs are all dead too or that he left behind him no heirs.

I am therefore unable to hold that Hariram became the sole tenant of the shop room in controversy and find the third issue accordingly.

The second issue which I take up raises the question of maintainability of the suit. One way of answering the issue is to say, as I do, that Kartick is a necessary party and that he not having been impleaded, the whole suit fails. Even on a generous, but unwarranted, assumption that Kartick is dead, exclusion of his heirs (the death or non-existence of whom is not proved) defeats the suit.

Mr. Dutt cites a number of authorities that a co-owner is entitled to sue trespasser for the benefit of all. The authorities are *Currimbhoy and Co. Ltd. v. L. A. Creet*(1), *Manganlal Dulabhdas v. Bhudar Purshottam and others*(2), *Tuljaram Harkishonedas v. Harkisan Jagjivan*(3), *Yestawant Balkrishna Lague v. Keshari Anant Pundit and others*(4), *Sambhu Gossain and another v. Piyari Mian*(5), *Ahmad Sahib Shutari v. Magnesite Syndicate Ltd. and others*(6), *Sheotaha Dube v. Lal Narain Prosad Chund and others*(7). But the suit depending before me is not, as Mr. Hazra rightly submits, a suit by a co-sharer against a trespasser or a tenant on sufferance. Indeed, in the scheme of the plaint Gopiram is not either. And the authorities listed above turn on one or the other. More, as pointed out by Rankin, C. J. in *Letters Patent Appeal No. 104 of 1928* (quoted by Nasim Ali, J. in *Joy Gopal Singha vs. Probodh Chandra Bhattacharjee and others*(8), a case of Mr. Hazra cites), the well-settled practice in this Court is to give a decree "for joint possession together with the trespasser and leaving it to the plaintiff to work out his further rights by a suit for partition". The learned chief-justice concludes:

"I do not think there is anything unusual in the form of the decree."

(1) I.L.R. (1929) 57 Calcutta 170.

(2) I.L.R. (1926) 51 Bom. 149; A.I.R. (1927) Bom. 192.

(3) A.I.R. (1929) Bom. 244.

(4) A.I.R. (1940) Bom. 13.

(5) A.I.R. (1941) Patna 351.

(6) I.L.R. (1915) 39 Mad. 501; A.I.R. (1915) Mad. 1214.

(7) A.I.R. (1930) Allahabad 422 A.I.R. (1931) Allahabad 208.

(8) (1935) 40 C.W.N. 81.

So this way Mr. Dutta cannot lift the bar of non-maintainability.

True it is, as Mr. Dutta submits, that a lessee inducted by a lessor cannot challenge his grantor's title. But the frame of the suit being what it is: driving away a partner for breaking this terms of partnership, that point does not arise now. It will, in a properly framed suit for eviction by the lessors.

Mr. Tibrewall while adopting Mr. Hazra's contention of non-maintainability because of exclusion of Kartick or his heirs urges three other grounds one of which is that Hariram's daughter is not a party. To that the answer is that Hariram left a will (since probated during the carriage of this litigation: exhibit D) in terms of which the two plaintiffs before me are the executors. Mr. Tibrewall reports that then the suit is not maintainable? by the executors and should therefore fail. This is his second ground. Were it necessary for me to decide this point, I would not have thought much of this, a mere misdescription, and directed an amendment of the plaint causing not addition of new plaintiffs, raising therefore no question of limitation and not prejudicing the defendants on the merits of the litigation. Even limitation cannot stand in the way of amendment, if the interests of justice require it: *Charan Das v. Amir Khan*(1) and *L. J. Leach and Co. and another v. Messrs. Juridine Skinner and Co.*(2). I need say no more, save refer to a Bench decision of this Court in *Peary Mohan Mukherjee v. Narendra Nath Mukherjee*(3), where addition of a party defendant as sebaite after the period of limitation was not held to be an addition of a new defendant. Mr. Tibrewall's third ground is absence of the mandatory notice under section 80 of the Procedure Code upon the receiver. When, however, I point out to him that there is no inconsistency between the propositions that section 80 is mandatory and that a notice thereunder may be waived (as has been here) by the authority for whose benefit it is provided, as held by the Privy Council in *Al. AR. Vellavan Chettiar and others v. The Government of the Province of Madras and another*(4), he is good enough not to press his contention

I therefore hold that the suit is not maintainable for reasons set out above and find the second issue in favour of the defendants.

Partnership failing—and fail it must—the alleged infirmity of multifariousness resting on that (partnership) against Gopiram coupled with certain declarations of tenancy rights and the like against the receiver does not arise. Does not arise too the question of limitation based on dissolution

(1) (1920) 47 I.A. 255.

(3) (1905) I.L.R. 32 Calcutta 582.

(2) A.I.R. (1957) S.C. 357.

(4) (1947) 52 C.W.N. 27.

of partnership. The first issue and the additional issue touching these matters are answered accordingly.

The sixth issue merits the finding, in view of all that goes before, that plaintiffs are entitled to no relief. My finding that the creation of the subtenancy in favour of Gopiram is bad at law does not avail them because of my further finding that the suit as framed is not maintainable.

In the result, the suit fails and is dismissed.

In all circumstances, here, I direct that each party do bear its costs, the receiver getting his costs out of the estate.

Certified for two counsel.

*Suit dismissed.*

N. C. S.

#### APPELLATE CIVIL

*Before the Hon'ble Chief Justice and the  
Hon'ble Mr. Justice P. C. Mallick.*

GOVINDA LAL KHAN

Vs.

THE STATE OF WEST BENGAL.\*

Civil

1956

December, 13.

*Bengal Excise Act, 1909 (Bengal Act V of 1909) Section 44A—Rule 58 of Rules under Notification No. 595 S.R. dated 30 March 1915—Renewal of license—Cancellation of license—Art. 226 of constitution, what relief available for such cancellation under—Appeal, grounds not urged before trial court, if may be raised before appellate court—Art. 226 of constitution, discretion under, how to be exercised.*

Licences for retail vend of Country Spirit under the Bengal Excise Act, 1909, are granted annually, and their normal duration is a year (under Rule 58 of Rules made under Notification No. 595 S.R. dated 30, March 1915). At the end of the year, an application has to be made for the renewal of the licence, which is generally almost automatic. But even if it be in practice automatic, no holder of a licence has got a legal right to a renewal (under section 44A).

When a license for any year is cancelled, what is cancelled is the license held by the licensee for that year only. If the licensee succeeds in a proceeding under Article 226 of the constitution in respect of such cancellation, the maximum relief which he can obtain will be an order cancelling the cancellation of his license for that year, and thus restoring it for that year only. Such relief, after the expiry of that year, would be of no practical benefit to the licensee, although it would qualify him to apply for a renewal by removal of the stigma of cancellation from him.

In an appeal, the complaint is that the trial court's order is wrong, where the points or question in the grounds of appeal were never raised before the trial court, such points or questions cannot be allowed to be raised before the appellate court either in the original grounds of appeal or by way of fresh grounds of appeal.

\* F. A. No. 2641 of 1955.

Discretion under Article 226 of the constitution cannot be exercised in favour of a petitioner who does not deny the charges made against by the Excise authorities either before the Departmental Authorities or in his petition before the High Court.

The material facts will appear from the Judgment:—

Pramatha Kumar Chakravorty—*for the Appellant.*

Anil Kumar Das Gupta—*for the Respondent.*

The judgment of the Court was as follows:—

**Chakravarti, C.J.:**—Having heard Mr. Chakravorty at some considerable length, we do not think that it can be said that, in refusing to issue a Rule on the application of Mr. Chakravorty's client, Sinha, J. acted wrongly.

The complaint is against an order, dated the 12th January 1954, by which the appellant's licence to sell country liquor from his shop at Rishra was cancelled. It was cancelled on a variety of grounds, of which it might suffice to mention two. It was alleged that the appellant's salesman supplied to one customer a short weight of liquor and that there were displayed in the shop eighteen bottles, each one of which contained one ounce of liquor less than the standard weight.

On the above allegations, the local Superintendent of Excise issued a notice on the Appellant to show cause why his licence should not be cancelled and, ultimately, it was cancelled by an order of the Additional District Magistrate of Hooghly. The Appellant appealed to the Excise Commissioner who dismissed the appeal on the 22nd April 1954. Thereafter, the Appellant petitioned the Government who refused to interfere. Next, he moved the Government for a review of their order, but was again unsuccessful. Thereupon, he made an application to this Court under Article 226 of the Constitution, but failed to induce Sinha, J. to issue a Rule.

Before Sinha, J. only two points appear to have been urged. It was contended that no breach of any condition of the licence had been committed and, therefore, the order of cancellation had no factual basis upon which it could rest. The learned Judge pointed out that a holder of an excise licence for sale of liquor had not only to observe the conditions set out in extence in the licence itself, but also the conditions attached to the opium licence which were incorporated by reference. It is not disputed that if the opium licence conditions are also to be complied with, the appellant had failed to comply with some of them, if the allegations against him were true.

It was next contended before the learned Judge that the Inspector who had searched the premises of the appellant and detected the irregularities had no jurisdiction to do so. The learned Judge was able to dispose of that contention easily by referring to rule 80 of the rules framed under section 66 of the Act.

The learned Judge and his judgment by saying that an attempt was made before him to draw into an examination of facts, but he refused to be drawn into that adventure. Thereupon the appellant preferred the present appeal.

It appears to me that there is an initial difficulty in the Appellant's way. These licences are granted annually and their normal duration is a year. At the end of the year, an application has to be made for the renewal of the licence and we are informed that, generally, the renewal is almost automatic. But even if it be in practice automatic, it cannot be said that any holder of a licence has got a legal right to a renewal. What was cancelled on the 12th January 1954 was the licence held by the Appellant for that year. Even if the Appellant were to succeed in the present proceeding in the maximum relief which he could obtain would be an order cancelling the cancellation of his licence and thus restoring it for the year 1954. That relief in view of the efflux of two years since then, and may be the efflux of more time before the matter is finally decided, would be of no practical benefit to the Appellant. By virtue of an order cancelling the cancellation of his licence of 1954 he would not acquire any legal right to a licence for the year 1957 or 1958. Mr. Chakravorty says that at least he would qualify to apply for a renewal and the stigma of cancellation would be removed from him. That, I must concede, is true, but Courts, hardly interfere under Article 226 when no immediate and practical relief can be given.

There is, however, a greater difficulty. In answer to our questions, Mr. Chakravorty formulated as many as six questions which he wished to argue before us. We requested him to point out from the grounds taken in his petition that even one of those questions had been taken in his petition not to speak of having been argued before the learned Judge. Mr. Chakravorty was labouring under a disadvantage in that he had not appeared before the trial Court, but on referring to the grounds set out in the petition, he felt constrained to admit that the grounds formulated by him had not specifically been taken. This Court is a Court of appeal and the complaint is that the learned Judge's order is wrong. It would be strange to hold that the learned Judge below acted wrongly in not considering points or questions which had never been raised before him and which he was not asked to consider and of which he was certainly not even aware. I consider it impossible to allow the Appellant to take fresh grounds in the appeal and make such grounds the basis of an attack on the learned Judge's order.

Apart therefrom, it appears to me that Mr. Chakravorty could not succeed on any of the six grounds formulated by him. I do not propose to enter into a detailed discussion, but what at least four of the grounds aimed at was to establish that the findings of fact had been arrived at in an irregular manner and that in carrying out the investigation against the Appellant, cer

tain procedural errors had been committed. Assuming that some procedural errors had been committed, which I by no means hold, I do not think that we should interfere under Article 226 at the instance of a licensee who, according to the facts found against him, supplied short weights of liquor to customers and abstracted certain quantity of liquor from the sealed bottles displayed by him. Mr. Chakravorty submitted that these alleged detections had not been made in his presence and therefore ought not to weigh against him. It is, however, significant that neither in any of his petitions of appeal before the departmental authorities nor in his petition before this Court, did he ever say that the allegations against him were untrue, and that the bottles alleged to have contained short weights of liquor did, in fact, contain the full measure.

In all the circumstances of the case, I do not think that this was a case where the learned Judge ought to have issued a Rule. His decision, in my view, was right and this appeal is dismissed.

There will be no order as to costs.

**Mallick, J.:**—I agree.

*Appeal dismissed.*

N. C. S.

|          |                                                  |
|----------|--------------------------------------------------|
| Civil    | CIVIL RULE                                       |
| 1953     | Before the Hon'ble Mr. Justice D. N. Sinha       |
| July—28, | ANNADA RROSAD GUIN                               |
|          | Vs.                                              |
|          | DISTRICT MAGISTRATE & COLLECTOR OF MURSHIDABAD.* |

*Bengal Village Self-Government Act, 1919 (Bengal Act V of 1919), SS. 6(2), 101—'Manner', if includes power to divide a Union into electoral wards—Rules under Notification No. L.S.G. 3R/46/49 dated 4 April 1952, made under S. 101(2) —স্ব-শাসন সমিতি ১০ ৪৫—Power of District Magistrate to divide Union into electoral wards—If delegated power from Government—Exercise of, when in compliance with Rules.*

The Bengal Village Self-Government Act, 1919, makes no express provision for division of a Union into wards. But Unions have always been divided into wards as a matter of fact, and have not been disputed. The plea that the word "manner" in Sections 6 (2) and 101 (2) (a) of the Act attracts the requisite power to divide a Union into wards is doubtful. Still in view of the longstanding practice, the interpretation imputed and acted upon by the Government should not be disturbed, as the entire administration of Union Boards in this state may be upset.

Under Rule 2 of the Rules for the Election of Members, Presidents and Vice-Presidents of Union Board, made under Notification No. L.S.G. 3R46/49 dated 4 April 1952, the District Magistrate is to decide in what manner each Union shall be divided into electoral wards, and under Rule 45 the District Magistrate cannot delegate this power where a proposal for such division is laid before the District Magistrate, who, having gone into the merits of it, approves it, the Rules are in this respect complied with.

\* Civil Rule No. 660 of 1953.

The power to divide the Union into wards under Rule 2 is conferred in the first instance upon the District Magistrate in the exercise of the rule-making power under the Act, and is not a delegated power from the Government.

The material facts will appear from the Judgment:—

Priti Bhusan Buiyan—*for the Petitioner*

Hemendra Kumar Das with

Smiriti Kumar Roy Chowdhury—*for the opp. parties*

The Judgment of the court was as follows:—

**D. N. Sinha, J.**—The petitioners Nos. 1, 2, 5 and 7 are the members of the Mohulla Union Board (Union No. 1). The petitioners Nos. 3, 4, 6 and 8 are residents of different villages within the said Union. The Mohulla Union No. 1 is situate within Police Station Beldanga, District Murshidabad. It was constituted under the Bengal Village Self-Government Act and consists of 11 Mouzas. The various Mouzas are not equally inhabited. It is even said that some of them are entirely bereft of inhabitants. Prior to 1947, the Union consisted of one electoral ward for the purposes of election of members to the Union Board. The number of members to be elected was fixed at six and three other members were to be nominated. By the West Bengal Act X of 1947 the system of nominating members was abolished. According to the Rules, formulated under powers conferred by section 101 of the Bengal village Self-Government Act, the District Magistrate is to decide in what manner each Union was to be divided into electoral wards and the number of members to be returned for each of such wards. The District Magistrate, may if he thinks convenient, decide that a union shall consist of only one electoral ward (Rule 2). This is power of the District Magistrate cannot be delegated (Rule 45). The Union has now been divided into three wards for the purpose of election of the six members of the Union Board. According to the District Magistrate this was found necessary because the Union Board consisted of more than 10 thousand people and it was found necessary to divide the Union into three electoral wards with a view to give a better representation of the inhabitants of the Union to the Union Board. The way that this was done and the procedure followed was as follows:—

The Circle Officer issued a notice to the president of the Union Board for initiating a division of the Union into electoral wards for the purpose of the ensuing election and the submit the particulars thereof. Various representations were received from the villagers and/or bodies inside the Union, and enquiries were made. A draft scheme was prepared, by taking into account various factors which are set out in the affidavit of the Circle Officer, Nirmal Chandra Ukil, affirmed on the 28th April 1953. This proposal along with the proposals of delimitation of other Unions were forwarded to

District Magistrate for his approval through the Sub-Divisional officer, Sadar. The S.D.O. Sadar forwarded this to the District Magistrate— by the Officer-in-Charge of the District Chowkidar Department, who placed the proposal relating to this particular Union together with others, before the District Magistrate for his approval. The District Magistrate after considering the proposal appended the word 'Yes' and then signed it. The District Magistrate has also affirmed an affidavit before me in which he confirms the above facts.

The petitioners challenge this delimitation into three wards on *two grounds*. Firstly, it is argued that the delimitation into wards must be made consequent upon the decision by the District Magistrate under the Rule mentioned above. The exact Rule is quoted below:

"The District Magistrate shall decide in what manner each union shall be divided into electoral wards and the number of members to be returned for each of such wards:

"Provided that the District Magistrate may, if he thinks convenient, decide that a union shall consist of one electoral ward only."

Mr. Burman argues that this amended Rule when compared with the previous Rule, shows that it is for the Magistrate to decide as to whether there should be one electoral ward or more. I do not think that the proposition is disputed. It is certainly for the Magistrate and the Magistrate only to decide as to whether there should be one or more wards, and the question is as to whether it could be said on the facts of this case that the Magistrate had decided it. Mr. Burman argues that the whole thing was done by the Circle Officer. He says that the affidavits on record shows that commencing from the very initiation of the idea, the whole thing was done by the Circle Officer. He refers to the annexures 'B' and 'C' and says that these two annexures show that the Circle Officer was the moving spirit in the matter of delimitation. That this is so to an extent is undeniable. In the affidavit it is not denied that the Circle Officer was responsible for initiating the proposals and framing of the scheme right up to the stage when it was placed before the District Magistrate. Mr. Burman argues that it is one thing to decide and another thing to approve. He has quoted from various dictionaries and says that approval means ratifying what others have decided whereas decision is quite different from approval. In my opinion, it all depends upon the facts of each case. A District Magistrate has under him a large number of Unions and it is scarcely possible for him amongst his numerous duties to carry on the work of delimitation right from the start until the end. But while it is open to others to make proposals or draw up schemes, the duty of finally deciding as to what the delimitation should be, depends upon the District Magistrate and upon no other person.

Where therefore, a proposal is laid before the District Magistrate and he having gone into the merits of it, approves it, I do not see how the result can be said to be the decision of any person other than himself. Without his sanction, no proposal is of any effect. If it could be shown that he never considered the proposal independently, but blindly gave his approval, then there would be a lot to say; but that is not the case here. The District Magistrate says that he considered the proposal and it became effective only after he agreed to it. In my opinion, the Rules in this respect have been complied with. It is then argued that the figures on the basis of which delimitation was made are not accurate. Upon the affidavits I find that the figures were taken from the only available census that the authorities could lay their hands upon at the time, the final figures of the official census not having been published yet and not being available.

Mr. Burman has next taken a point which is much more difficult one to decide. In the Act, namely, the Bengal Village Self-Government Act, 1919, there is no provision for the delimitation of Unions into wards. Under section 6, the local Government shall, by notification, establish a Union Board for every Union constituted under section 5, and shall fix the number of members of each Union Board provided that the number of members of a Union Board shall not be less than six or more than nine. Sub-Rule 2 runs as follows:—

“ The members shall be elected within such time and in such manner as may be prescribed by rules under section 101.” Coming now to section 101, we find that it prescribes that the local Government may, after previous publication, make Rules to carry out the purposes of this Act. In Sub-section 2 some of the headings upon which Rules may be made have been set out. One of this is to determine the manner and time of appointment or election of members of Union Boards, and generally regulating all elections under the Act.

Apart from these two sections, there is no provision in the Act for delimitation of a Union into wards. In the Bengal Municipal Act, on the contrary, the Government has been given powers to divide municipal areas into wards. The question is as to whether it is permissible by the Rules to delimit a Union into wards and confer the power of doing so on a Magistrate. Mr. Burman argues that there is no power conferred upon the Government to delegate any such power of delimitation to the District Magistrate. The learned Government Pleader says that section 6 sub-section 2 prescribes that Rules may be made for the ‘Manner’ in which members shall be elected, and section 101 gives power to the local Government to make such Rules. He argues that delimitation of a Union into wards is laying down the ‘manner’,

in which members shall be elected. He says that a particular Union may be unwieldy and it will not be possible for all voters in the area to vote for all members and that in every civilized country, and also in this country in general, the power of delimitation of wards is always exercised in the case of election to public bodies. The word "manner or election" is certainly a very wide expression to use and I must confess that I have some doubt as to whether this includes the power to delimit the constituencies into wards,—because it would have the effect of limiting the power of each voter to vote for any members who was going to be elected. In other words by the rules only some voters are allowed to vote for only some members and not all voters for all members. But the Act is a fairly old one having been promulgated in the year 1919 and upto now it has never been interpreted to mean that the power does not exist to delimit the Unions into smaller wards to facilitate elections. In this case, no interpretation of the Constitution Act, is involved. It is a case of plain interpretation of the Statute concerned. I am therefore unwilling to disturb the interpretation which has been put upon the Act for such a length of time. It is admitted that, with some exceptions, most Unions are divided into wards and if I hold that the Rules which sanction such delimitation are ultra-vires, then it would upset the entire administration of Union Boards in the State. Since the word "manner of election" is capable of a wide or narrow meaning I must ascribe to it that meaning which has so long been accepted.

I next come to the question of delegation. Mr. Burman has argued that the Government could not delegate to the District Magistrate the power concerning delimitation of wards. As the learned Government Pleader has pointed out, there is no question of delegation here at all. It is not as if the Government has been expressly given the power to delimit, which power it has delegated to other officers. That the District Magistrate is called upon to delimit a Union into wards is a part of the Rules and if the Rule-making power in this respect exists, then the Rule itself is valid, and the District Magistrate has the power to act under Rule 2, not because the power has been delegated to him by the Government, but because the power has in the first instance been conferred upon him by the Rules which have been framed within the frame work of the Act itself and in accordance with law.

The result therefore is that this application fails and must be dismissed. The Rule is discharged. Interim order is vacated. I make no order as to costs.

The interim order that has already been made will continue for a period of three weeks more, since the petitioner intends to appeal against the order. After which may further stay must be obtained from the Appeal Court.

Rule discharged.

N. C. S.

# CIVIL REVISION

*Before the Hon'ble Mr. Justice P. N. Mookerjee and  
the Hon'ble Mr. Justice Laik.*

ROUFANNESSA BIBI

Vs.

UNION OF INDIA.\*

Civil

1962

February, 16.

*(Constitution, Article 227—Jurisdiction under, if barred by appeal under Section 19(1) (f) of the Defence of India Act, 1939 (Central Act XXXV of 1939)—Rate of interest on award of compensation by the Arbitrator, how to be computed.*

The existence of an appeal under Section 19(1) (f) of the Defence of India Act, 1939, from the final award of compensation by the Arbitrator to the High Court, is no bar to the exercise of the jurisdiction of the High Court under Article 227 of the Constitution *Manmatha Nath Biswas vs. Emperor*(1), *relied on*.

The rate of interest awarded by the Arbitrator should be accepted, but should be made payable on the entire amount awarded by him as compensation for the acquired property from the date of the Collector's taking of possession of the same, and the date of withdrawal, if any, of any part of the said compensation by the referring claimant, and further interest at the same rate should be directed on the balance of the final award by the Arbitrator until payment or deposit of the same by the Government.

The material facts will appear from the judgments:—

Chittosh Mukherjee—for the Petitioner.

N. C. Chakraborty with Susil Kumar Biswas—for the Opposite Party.

The judgment of the Court was as follows:—

(1) (1932) 37 C.W.N. 201.

\*Civil Revision Nos. 3367 & 3368 of 1960.

**P. N. Mookerjee, J.:**—In these two cases the only point that arises is as to whether the learned Arbitrator was justified in awarding interest, as he did, simply on the difference between the total amount, awarded by him as compensation for the acquired property and the amount, withdrawn by the referring claimant from the date of taking possession by the Government till only the date of the Collector's offer or award.

As held by us in earlier cases, the rate of interest, award by the learned Arbitrator should be accepted but it should be made payable on the entire amount, awarded by him as compensation for the acquired property, from the date of the Collector's taking of possession of the same, namely, April 12, 1946, and the date of withdrawal, if any, of any part of the said compensation by the referring claimant here March 13, 1954, the date of withdrawal of 80 P.C. of the Collector's award and further interest at the same rate should be directed on the balance of the final award by the Arbitrator until payment or deposit of the same by the Government. The learned Arbitrator's award of interest should be modified accordingly and interest should be calculated in the light of the above direction and the Rules would succeed to that extent.

It is only necessary to add that, on behalf of the State, a preliminary objection was taken to the maintainability of the instant Rules under Article 227 of the Constitution and it was contended that, in both these cases, where the amount of compensation awarded finally by Arbitrator, exceeded Rs. 5,000, an appeal lay to this court under section 19(1) (f) of the Defence of India Act the bar (excepting) under the relative and relevant Rule 19 in its second proviso not applying,—and in such circumstances, no revision application under Article 227 of the Constitution would be maintainable. It is enough, for our present purpose, to refer to the decision of this Court, reported in *Manmatha Nath Biswas vs. Emperor*(1), to overrule this preliminary objection.

We may also state here that the learned Government pleader's argument that no interest should have been awarded at all in the instant case on the authority of the decision of the Supreme Court, reported in *Mahabir Prosad Rungta vs. Durga Dutta*(2), cannot be accepted as even upon that decision, in the light of the earlier decision of the Supreme Court, reported in *Satinder Singh & ors. vs. Untarao Singh & ors.*(3), and the series of decision, cited therein, interest would clearly be payable in the instant cases.

(1) (1932) 37 C.W.N. 201.

(3) A.I.R. (1961) S.C. 908.

(2) A.I.R. (1961) S.C. 990.

We accordingly, make these Rules absolute to this extent that the award of the learned Arbitrator on the head of interest is modified on the lines, indicated hereinbefore. There will be no trdes for costs in any of these Rules.

**Laik, J.:**—I agree.

Rule absolute.

N.C.S.

APPELLATE CIVIL

*Before the Hon'ble Mr. Justice R. P. Mookerjee.*

GOLUM ALI MONDAL & ORS.

Vs.

MD. IDU & ORS.

Civil

1968

September, 1.

*Appeal—New question of law, if may be raised for the first time in Second Appeal, Bengal Tenancy Act, 1885 (Central Act VIII of 1885), Section 26F—Application for presumption under—Effect of order upon disferent right of purchaser in disputed land.*

A pure question of law relating to the title of the parties to the property in suit may be raised for the first time in a Second Appeal before the High Court.

Where a purchaser acquires the raiyati interest in a piece of land from the holders of the superior raiyati interest therein, and also acquires the under raiyati interest in the same land from the holders of the under raiyati interest therein under the transferor raiyats, there may be a temporary merger of the two rights in the purchaser, but such rights are capable of revival. When an order of presumption order section 26F of the Bengal Tenancy Act, 1885, is made in respect of such and in favour of the cosharers of the transferor raiyats, such cosharers in effect get a right to receive rent from the purchaser, for the effect of the presumption order in the revival of the under raiyati right of the purchaser in that land.

The Scope of an application under Section 26F of the Bengal Tenancy Act, 1885, is limited to the question whether the applicant cosharer is entitled to have the land purchased by the opposite party retransferred in his favour. If the purchaser opposite party has acquired any other right in the land purchased by him than that acquired from the transferor cosharer, it is not necessary for the purchaser opposite party to canvass the nature or extent of that other right in a summary proceeding under section 26F.

The material facts will appear from the Judgment:—

Satindra Nath Ray Chowdhury with Sovendra Madhab Basu—for the Appellant.

Benoyendra Nath Sen—for the Respondent.

The Judgment of the Court was as follows:—

**Renúpada Mukherjee, J.:**—The only substantial question of law which arises in this appeal and which does not appear to be covered by any decided case of this court is:—

Is the underraiayati interest of a person in a land who subsequently purchases the superior right of his landlord's landlord adversely affected after an order for presumption under section 26 F of the Begngal Tenancy Act is made at the instance of and in favour of a co-sharer of that superior landlord?

A subsidiary question which arises in that connection is:—

Whether such an underraiyat can bring a separate independant suit after such an order has been made in a presumption proceeding against him in which the underaiyat fails to set up his claim as an underraiyat?

In order to appreciate the circumstances under which the above controversial question of law have arisen, it is necessary to state the following facts about which there is no dispute. The disputed plot of the present litigation is C.S. plot No. 4093 of Mouza Taragunia in the District of 24 Parganas, measuring 17 acres. At one time this plot of land belonged to one—Darbar Mondal in raiyati right. Darbar left two sons Nepal Mondal and Maniruddin Mondal. It is admitted that by an amicable partition this plot of land fell to the share of Nepal Mondal. Nepal had two wives. Golamali Mondal, defendant No. 1 of the Trial Court, and Amela Khatun defendant No. 12 of the Trial Court, were a son and a daughter by the first wife. The second wife was Jamela Khatun, defedant No. 10 of the Trial Court. Defendants Nos. 6 to 9 and defendant No. 11 are the stns and daughter of Jamela Khatun by Nepal Mondal. Defendants Nos. 2 to 5 of the Trial Court are heirs of Maniruddtn Mondal.

According to the case of plaintiff Muhammad Idu, the disputed land fell to the share of defendants Nos. 6 to 11 of this suit, and subsequently by a further partition amongst them, to the share of defendants Nos. 9 to 11. The case of the plaintiff further was that defendants Nos. 9 to 11 leased out the disputed land to defendants Nos. 6 to 8, who in their turn gave a sublease of the disputed land to the plaintiff by a patta, exhibit 1(a) dated 4th March, 1946. The plaintiff has traced his title in this manner.

According to the case of defendants Nos. 1 and 12, who are a son and daughter of Nepal by his first wife, the disputed land fell to their share after a partition amongst the numerous heirs of Nepal Mondal. This claim was negatived by the courts below, and Mr. Roy Chowdhury appearing on behalf of the present appellants, who are defendants Nos. 1 and 12 of the Trial Court, conceded fairly that it is not open to him & agitate this question in second appeal because it is concluded by a finding of fact.

The real controversy, as I have already said, centres round the effect of of a decision in a preemption proceeding under section 26F of the Bengal Tenancy Act. The controversy has arisen under the following circumstances. After taking a sublease of the disputed land from defendants Nos. 6 to 8 of the Trial Court, the plaintiff purchased the superior raiyati interest of defendants Nos 9 to 11 by a kobala which, though not exhibited in the

Trial Court, was referred to be that court. Defendants Nos. 6 to 8 of the Trial Court, who were the immediate landlords of the plaintiff, had also joined in that Kobala. The position, therefore, was that by that Kobala the plaintiff purchased the under raiyati interest of defendants Nos. 6 to 8 and also the superior raiyati interest of defendants Nos. 9 to 11. After that purchase defendants Nos. 2 to 4 of the Trial Court filed an application for preemption under section 26 F of the Bengal Tenancy Act which was contested by the present plaintiff. That application was allowed, and it is not disputed that symbolical delivery of possession was taken by the pre-emptors. In view of these findings of fact about which there was no dispute, the first question of law which arises is what is the effect of the order made in the preemption proceedings.

I may mention that this question was not raised in either of the courts below, and both the courts below decreed the suit in favour of the plaintiff respondent on the finding that his title to the disputed land has been proved, and that the appellants who are defendants Nos. 1 and 12 of the Trial Court have got no title to the same. As the question now raised by Mr. Roy Chowdhury is a pure question of law, I allowed it to be raised for the first time in this appeal. Mr. Roy Chowdhury's main contention was that the under-raiyati right which the plaintiff respondent had in the disputed land, was merged in the superior raiyati right as soon as he made the purchase from defendants Nos. 9 to 11 of the Trial Court, and the defendants Nos. 2 to 4 of the Trial Court having obtained an order of pre-emption, they are entitled to get possession of the disputed land, and the plaintiff has no right to resist their claims.

Mr. Sen appearing on behalf of the plaintiff respondent tried to meet the above contention of Mr. Roy Chowdhury by saying that the preemption order being in favour of defendants Nos. 2 to 4 of the Trial Court, the present appellants are not entitled to take advantage of that order as against the plaintiff respondent. I am not very much impressed by this argument of Mr. Sen, because after all, his client has come to the court of plaintiff and he must establish his title to the disputed land as also his right to get khas possession of the same. I must, however, say that I do not accept Mr. Roy Chowdhury's contention that the effect of the order made in the preemption proceeding is that defendants Nos. 2 to 4 who were the pre-emptors, and entitled to get khas possession as against the plaintiff by virtue of that order. It may be that there was a merger of the two rights of the plaintiff respondent in the disputed land which I have already mentioned *viz.*, There under raiyati right held under defendants Nos. 6 to 8 of the Trial Court and the defendants Nos. 6 to 8 of the Trial Court and the superior right purchased from defendants Nos. 9 to 11. But there the defendants Nos. 2 to 4 have acquired only that raiyati interest in the disputed land which was transferred by defendants Nos. 9 to 11 who were the holders of the superior

raiyaṭi right. That right is nothing more or less than the right to receive rent from the plaintiff. The preemptors have stepped into the shoes, not of the plaintiff who was both an underraiyat in respect of the disputed land, but into shoes of the raiyat transferrors of the plaintiff. That being the case, defendants Nos. 2 to 4 are entitled raiyat rent from the plaintiff respondent. The effect of the preemption order would be revival of the underraiyaṭi right of the plaintiff respondent which might have been merged in the superior right for the time being. This being the position in law, the first contention put forth on behalf of the appellant, by Mr. Roy Chowdhury fails.

The other subsidiary contention which was advanced by Mr. Roychowdhury on behalf of the appellants was that in any case, this under raiyaṭi right, on the strength of which the plaintiff is now seeking khas possession of the disputed land, was not put forth in the preemption proceeding. That being the case, the plaintiff is not entitled to advance that claim by an independent suit. In support of this contention Mr. Roy Chowdhury referred to a case reported in *Mahini Mohan Mitra vs. Radha Sundari Dasi*(1). In that case it was held that a suit by a person against whom an order for preemption under section 26F of the Bengal Tenancy Act has been made at the instance of a landlord to recover possession does not lie after the landlord has obtained possession by executing the order for preemption. At first sight, this case may seem to be of some assistance to the contention now put forth by Mr. Roy Chowdhury, but if the case is closely examined, it would be seen that the facts of this case are one different from the facts of the present case, and it does not materially support Mr. Roy Chowdhury's contention. In the case cited by him, the person against whom the order for preemption was made possessed only one right in preempted land. In the present case, the plaintiff, as has already been said, possessed two rights. The scope of the preemption application in the present case as in all cases under section 26F of the Bengal Tenancy Act, is limited to the question whether the applicant is entitled to have the raiyaṭi land purchased by the opposite party re-transferred in his favour. If the purchaser opposite party has got any other right in the land purchased by him, it is not necessary to canvass the nature or extent of that right in a summary proceeding under section 26F of the Bengal Tenancy Act. It is needless to say that a question of title arising in that form cannot properly be the subject matter of a preemption proceeding under section 26F of the Bengal Tenancy Act. That being the case, it was not necessary for the plaintiff respondent to urge his under raiyaṭi right in the previous preemption proceeding. The present case is, therefore, distinguishable in this manner from the facts of the case reported in *Mohini Mohan Mitra Case*(1). I, therefore, hold that the plaintiff respondent is entitled to maintain an independent suit for establishment of his under

(1) (1935) 39 C.W.N. 1014.

riyati right in the disputed land and for recovery of khas possession thereof on that basis.

The substantial contentions raised on behalf of the contents, therefore, fail. Mr. Roy Choudhury tried to raise another small contention, viz., that the disputed land having been sold on the footing of a khas land in the Kobala under which the plaintiff purchased it, the plaintiff is not entitled to plead otherwise in this suit. I am of opinion that there is no merit in this contention, because the description of the disputed land as khas land in the Kobala does not certainly operate as estoppel against the plaintiff.

All the contentions urged on behalf of the appellants having failed, this appeal is dismissed with costs to the contesting plaintiff respondent.

Appeal dismissed.

N.C.S.

# APPEAL FROM ORIGINAL CIVIL

*Before the Hon'ble Chief Justice and the Hon'ble  
Mr. Justice Debabrata Mookerjee.*

DAULATRAM AGARWALLA

Vs.

CHAMPALAL INGRAJ

Civil

1961

December. 22.

*Letters Patent, 1865 (Calcutta High Court), Cl. 12—Fresh leave, if necessary for amendment of plaint—Grant of leave, if a judicial act—Appeal, if lies from such grant of leave.*

Clause 12 of the Letters Patent of 1865 of Calcutta High Court deals with the question of jurisdiction only, and not with the procedure regulating the trial and determination of suits. The power of the Court to deal with matters of amendments of pleadings for determining the real question in controversy between the parties is derived from the Code of Civil Procedure. The power of amendment inheres in the Court for trial and determination of suits of every description in respect of which it acquires jurisdiction under clause 12 of the Letters Patent.

Where part only of the cause of action arises within jurisdiction, or part only of the facts is within jurisdiction, the obtaining of the leave of the Court is made a condition precedent to the Court assuming or acquiring jurisdiction.

Any substantial or material addition to, or alteration of, the cause of action as pleaded in the original plaint is dependant on obtaining of prior leave of the Court inasmuch as the question of amendment and the question of jurisdiction are inextricably linked up in such cases. Similarly, when a new party is added to a suit, the cause of action is laid as against him for the first time when he is so added, and, consequently, in such a case, the obtaining of fresh leave is imperative.

There is no difference between (1) an order granting leave under clause 12 of the Letters Patent, (2) an order refusing to grant a leave granted under clause 12, and (3) an order granting fresh leave under clause 12 in respect of the amendment asked for. Every such order is a judgment from which an appeal lies under clause 15 of the Letters Patent.

\* Appeal from Original order No. 85 of 1961.

The material facts will appear from the judgment:—

A. C. Bhabra, F. N. Sraf M. L. Jain—*Counsel for the Appellant.*

M. Hazra with B. L. Vayas—*Counsel for the Defendant.*

The judgment of the Court was as follows:—

**H. K. Bose, C.J.:**—This is an appeal against an order of G. K. Mitter, J. allowing certain amendments of the plaint and granting fresh leave under clause 12 of Letters Patent in respect of such amendments.

The plaintiff respondent which is a registered partnership firm carrying on business at 195, Old China Bazar Street, Calcutta, filed a suit in this Court on or about the 15th December, 1959 against the appellants Daulatram Agarwalla and Shankarlal—Agarwalla describing the former as the Karta or Manager of a joint Hindu Mitakshara family consisting of himself and his sons Shankarlal and Shambhu Prosad and as carrying on a joint family business under the name and style of Shankarlal Shambhu Prosad, along with Shankarlal Agarwalla, at Katihar and also at Labha, in the District of Purnea in the State of Bihar recovery of a sum of Rs. 74,612-89 nP. in respect of certain commission agency dealings and transactions. In the plaint as originally filed the case made was that in or about the year 1952 the defendants in their said business of Shankarlal Shambhu Prosad appointed the plaintiff firm as their Commission Agents for the sale of raw jute at certain terms and conditions set out in the plaint. Thereafter pursuant to such terms and conditions the plaintiff firm acted as the Commission Agent of the defendants. The accounts in respect of the dealings and transactions had between the parties were adjusted from time to time and on or about the 15th June, 1959, a sum of Rs. 38,344-48 nP. was found due and owing by the defendants to the plaintiff firm, but, later on it was discovered that there was a slight error in the account and the amount actually due was Rs. 38,334-68 nP. There were further dealings and transactions between the parties after that date and as a result of such further dealings and transactions a sum of Rs. 78,616-41 nP. became due from the defendants to the plaintiff. But after giving credit of a sum of Rs. 5,900-00 nP. which was payable by the Plaintiff firm to the defendants in respect of the sale proceeds of a consignment of jute sent from Labha Station to Cossipore Railway Station the sum that remained due from the defendants to the plaintiff was Rs. 66,280-39 nP. and adding to that a sum of Rs. 8,232-50 nP. being the amount of interest due at the stipulated rate, the total amount that remand payable to the plaintiff was Rs. 74,512-89 nP. According the claim of the plaintiff was laid at this figure in the original plaint. It is to be noted that the suit was filed after obtaining leave under clause 12 of the Letters Patent.

On or about 7th December, 1960 the plaintiff firm took out a summons for amendment of the plaint. The material amendments asked for were as follows:—

In the cause title of the plaint Daulatram Agarwalla was described as Karta or Manager of a joint Hindu Mitakshara family consisting of himself and his sons Shankarlal and Shambhu Prosad and/or his grand son and other co-parceners, if any, of the said joint family. So the words "and/or his grandson . . . . . family" were added by this amendment. Then in paragraph 2 of the plaint it was stated that in 1952 the defendants appointed the then registered partnership firm of Champalal Ingraj as then constituted and consisting of four partners, Champalal—Bhutoria, Labhuram Patwari, Pratapmull Parwari, and Bhimraj Patwari as their Commission Agents. Certain alterations as to the terms as set out in clause (d) and clause e(1) in paragraph 2 were also made. In paragraph 3(a) the plaint it was stated that the firm which was appointed the Commission Agent acted as such till 11th April 1954 on which date three partners namely Labhuram Patwari Pratapmull Patwari, and Bhimraj Patwari, retired from the said firm and all their rights, liabilities, assets, credits and benefits of all contracts which accrued on were to accrue and the good will of the firm were assigned by the retiring partners in favour of Champalal Bhutoria by a deed dated the 6th May, 1954. In paragraph 3(b) it was stated that the defendants had knowledge and notice of the retirement of three partners and about the assignment, and the dealings and transactions continued between the defendants and Champalal Bhutoria until 11th June, 1954. In paragraph 3(c) it was stated that on or about 11th June, 1954 a deed of partnership was executed whereby Champalal Bhutoria took in two partners, namely, Bejoy Singh Bhutoria and Sumermull Bhutoria in the said business as a going concern and the plaintiff firm was constituted and registered with the Registrar of Firms and all the rights of Champalal Bhutoria including the rights, liabilities, etc. which he acquired by reason of the deed of 6th May 1954 were assigned and become vested in the partners of the plaintiff firm as constituted on the 11th June 1954. In paragraph 3(d) it was stated that the defendants had full knowledge and notice of the aforesaid facts, and the commission Agency business was by concurrence of the defendants and the plaintiff firm as newly constituted, carried on, according to the terms and conditions mentioned in paragraph 2 of the plaint. In paragraph 3(e) an agreement accepting all the dealings and transactions had since 1952, is pleaded, and in paragraph 3(f) the dealings and transactions had pursuant to such agreement as pleaded in paragraphs 3(d) and 3(e) are pleaded. In paragraph 11 of the plaint it is pleaded that since the institution of the suit the plaintiff firm had realised

the sale proceeds in respect of 180 bales of jute and a sum of Rs. 12,267-62 nP. was payable by the plaintiff to the defendant and so after giving credit for this amount, the amount that would still remain payable by the defendants to the plaintiff was the sum of Rs. 62,245-27 nP.

It will thus appear that by making certain alterations in paragraph 3 of the original plaint and by introducing paragraphs 3(a), 3(b), 3(c), 3(d), 3(e) and 3(f) some substantial amendments were made in the cause of action as originally pleaded in the plaint. It may be pointed out at this stage that this application for amendment was made inasmuch as the defendants in their written statement filed in answer to the original plaint, took up the defence that there was no argument appointing the plaintiff firm which filed the suit as commission agent as pleaded in the plaint, but the defendants had appointed a firm in which, Clampalal Bhutoria and the three Patwaris were partners. A further point was taken in the written statement that besides the persons whose names are mentioned in the original plaint, there were other members of the joint family of the defendants who were not made parties to the suit and so the suit was bad for non-joinder of parties. The application for amendment having come up for hearing before G. K. Mitter, J. the learned Judge by his order dated the 28th March, 1961 granted fresh leave under clause 12 of the Letters Patent in respect of the amendments asked for and allowed all the amendments that had been asked for in respect of the plaint. The defendants have thereupon preferred the present appeal against the said order of the learned judge and have contended before us that the amendments asked for introduced a totally different cause of action and so should not have been allowed and further the Court had no power to grant fresh leave under clause 12 of the Letters Patent to allow any amendment of a plaint which added to or altered the cause of action as pleaded in the original plaint and in respect of which leave under clause 12 of the Letters Patent had been obtained prior to the institution of the suit. According to the learned counsel for the appellants leave under clause 12 of the Letters Patent is a condition precedent to the institution of a suit and it can be given only once by the Court in respect of a suit at the time of its institution.

The attention of the Court has been drawn by the learned counsel for the appellants to decisions of the different High Courts which have a bearing on this point. The first decision to which reference was made is the case of *Rampurtab Samruthroy vs. Premsukh Chandamal*(1). In this case Telang, J. after referring to certain decisions of the Calcutta, Madras and Bombay High Courts made the following observations:—

“From all these authorities it seems to me to result that the grant of leave under clause 12 of the Letters patent is judicial act which must be

(1) (1890) I.L.R. 15 Bom. 93.

held to relate only to the cause of action disclosed in the plaint as presented to the Court at the time of the grant; that such leave which affords the very foundation of the jurisdiction is not available to confer jurisdiction in respect of a substantially different cause of action which was not judicially considered at the time it was granted, that in respect of such a different cause of action leave under clause 12 cannot be granted after the institution of the suit, and that therefore the Court cannot try such a different cause of action except in another suit duly instituted. It follows from this consideration that any amendment such as Mr. Krikpatrick proposes to make in the plaint cannot be of any avail . . . . . In the course of the argument, I did indeed suggest that the Court might perhaps consider itself seized of the case by virtue of the leave when once grantee and that being so seized of the case it might then proceed to deal with any application for amendment as in a case under the ordinary jurisdiction. But in view of the authorities above referred to as to the nature of the order under clause 12 and having regard to the fact that the point is one relating, not to procedure, but to jurisdiction, it appears to me that that suggestion cannot be maintained."

After making these observations the learned Judge proceeded to consider the nature of the cause of action as pleaded in the original plaint and the nature of the amendment asked for and recorded the following conclusion at page 103:—

"I must therefore held that in this case which is governed by clause 12 of the Letters Patent, the leave of the Court was necessary under that clause to give the Court jurisdiction; that the jurisdiction so conferred was confined to the cause of action disclosed in the plaint as originally framed; and that the Court cannot now allow an amendment which shall substantially alter that cause of action. In this view it becomes unnecessary to consider whether the cause of action intended to be introduced into the suit by amendment would itself be one over which this Court could exercise jurisdiction without leave granted under clause 12."

In this case the plaintiffs who resided at Indore and carried on business in Bombay by their Munim, sued the defendants upon 17 Hundies which were drawn by the defendants from Sihore upon the plaintiff in Bombay in favour of several individuals and firms in Bombay. The plaintiffs at the request of the defendants paid the said hundies on the defendants account and called upon the defendants for repayment but as no repayment was made the plaintiffs filed the suit after obtaining leave under clause 12 of the Letters Patent. The defendants took up the defence that the hundies in respect of which the suit had been brought were merely items in one account comprising a long series of transactions between the plaintiffs and the

defendants and they contended that the plaintiffs are not entitled to bring a suit in respect of certain selected items in an account but must sue for the balance, if any, upon the whole account. In their written statement they asked for an account after taking into consideration all the dealings between the plaintiffs and the defendants. At the hearing of the suit the learned counsel appearing for the plaintiffs submitted that the hundies sued upon were separate transaction but if the Court accepted the case of the defendants as set up in the written statement, opportunity might be given to the plaintiffs to amend the plaint. Telang, J. as pointed out already found that no such amendment could be allowed and dismissed the suit.

The next case that may be considered is reported in *Rampurtab Samrathra vs. Foolibai & another*(1). In this case the plaintiff firm brought a suit against one Foolibai for recovery of a sum of Rs. 58,883-4-9 in respect of certain commission agency transactions after obtaining leave under clause 12 of the Letters Patent, alleging that Foolibai was the owner of the defendant firm. In the written statement filed by the defendant it was denied that Foolibai was the owner and it was stated that the firm belonged to her son Punam Chand who was then dead and who had left an infant daughter Goolibai. In consequence of these allegations in the written statement the plaintiff added Goolibai as a party defendant to the suit but no fresh leave was obtained when Goolibai was added as a party. At the hearing the learned counsel appearing for the added defendant Goolibai relied a section 22 of the Limitation Act and contended that when Goolibai was added as a defendant, the suit was to be treated as instituted against her on that date and fresh leave under clause 12 of the Letters Patent should have been obtained at that time. But no fresh leave having been obtained, the Court had no jurisdiction to entertain or try the suit so far as Goolibai was concerned. At page 774 Candy, J. in dealing with this question of jurisdiction observed inter alia as follows:—

“ According to the view which has been always accepted in this Court, the leave required by clause 12 of the Letters Patent must be granted, if at all, at the time of the acceptance of the plaint and cannot be granted afterwards. By section 22 of the Limitation Act the suit as regards Goolibai must be deemed to have been instituted when she was made a party. There was the time if at all to apply for leave under the clause. To use language of the clause the “suit” was then “received” against Goolibai, it cannot be inferred that leave was then allowed or granted.”

The learned Judge ultimately held that the suit was not maintainable against Goolibai and therefore dismissed the suit.

(1) (1896) I.L.R. 20 Bom. 767.

There is nothing in this decision to suggest that no fresh leave could at all be granted at the time Goolibai was added as a party. On the other hand, the implication is that at the time Goolibai was added as a party it was open to the plaintiff to apply for such leave.

The next decision to which reference may be made is that of *Shaw Wallace & Co vs. Gobordhan Das Khatoob*(1). In this case the plaintiffs filed a suit in the Original Side of the Bombay High Court on 19th November 1904 against "the firm of Shaw Wallace & Co., as it was constituted on the 13th September 1898 and the partners in the said firm on that date" in respect of breach of an agreement dated the 13th September, 1898. On 22nd December, 1904 the plaintiffs obtained an order of amendment of the plaint and the plaint was subsequently amended by the addition of the names of Messrs. Wallace, Ashton, Greenway, Hue and Meakin. The last named person Mr. Meakin was the executor of one Secherau who was a partner of the firm but who had died in the mean while. It was found that the four persons namely, Wallace, Ashton, Greenway and Hue being members of the old firm who could be sued under the firm name, the suit as originally framed was maintainable against them. But with regard to Mr. Meakin, Jenkins, C.J. observed as follows:—

"Mr. Meakin was not a party to the suit at its admission. Even if leave subsequent to the admission of a plaint could be given under clause 12 of the Letters Patent as to which I say nothing—I am clearly of opinion that leave could not be given by the Prothonotary. Mr Meakin therefore as the executor of Mr. Secherau has wrongly been added as a defendant."

Thus the question whether a leave subsequent to the admission of a plaint can be given under clause 12 of the Letters Patent was left openly by the learned Chief Justice. Tayabji J. against whose order the appeal had been preferred dealt with clause 12 of the Letters Patent in the following manner:—

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"If the leave under clause 12 the Letters Patent had not been obtained, and if the suit had been filed as an ordinary suit without any leave no question as to the propriety of the amendment could possibly have arisen. But the difficulties have arisen only by reason of the fact that the amendments were introduced into a plaint which had been accepted under clause 12 of the Letters Patent. For the decisions show that very careful consideration is required before any amendments can be permitted in a suit accepted under clause 12 of the Letters Patent and if the amendments

(1) (1905) I.L.R. 30 Bom. 364.

are material or to alter in any way the character of the suit or the liabilities of the parties. I think they would be open to very serious objection and may not be covered by the leave originally granted."

So this decision does not also lay down in any definite terms that no leave under clause 12 of the Letters Patent can in any circumstances be granted in respect of amendments made in a suit filed with prior leave under clause 12 of the Letters Patent.

The next decision to be considered is of Kania, J. in the case of *Motilal Tribhovandas Choksey vs. Shankarlal Chhaganlal*(1). In this case a summary suit had been filed in the name of the plaintiff as a firm disclosing the names of six persons as partners of that firm. The case made in the plaint was that the defendants had given instructions to the plaintiff firm consisting of six persons as partners to effect certain transactions on his behalf; the plaintiffs acted as brokers and as a result of carrying out the transactions the plaintiffs had suffered loss and they claimed the same from the defendant. As the defendant was a resident of Surat it was alleged in the plaint that a part of the cause of action had arisen in Bombay and leave under clause 12 of the Letters Patent was obtained before the plaint was filed. When the plaintiff firm took out a summons for judgment, the defendant raised the contention that he had dealings with *Motilal Tribhovandas*(1), the individual, and not with the plaintiff firm and so the firm consisting of the six persons had no cause of action against him and the suit was liable to be dismissed upon this plea being taken the defendant was granted an unconditional leave to defend the Suit. Thereafter an application was made for amendment of the plaint and *Motilal Tribhovandas Choksey*(1), the individual, continued the suit in his own name after consequential amendment had been made in the body of the plaint to the effect that it was *Motilal*, the individual, who had a cause of action against the defendant. But at the time the order for amendment was obtained no leave under clause 12 of the Letters Patent was asked for or granted. At the hearing of the suit the learned counsel appearing for the defendant raised the objection that as no leave under clause 12 had been obtained at the time the amendment was made, the Court had no jurisdiction to try the suit. Kania, J. after referring to the decision in 15 Bombay page 93 observed as follows:—

"In 15 Bombay 93 it was held that the leave granted was confined to the cause or causes of action set forward in the plaint at the time the leave was granted, since the plaint cannot be amended so as to alter the cause of action. If an amendment which would alter the cause of action is made it necessarily follows that fresh leave should be obtained in respect

(1) A.I.R. (1939) Bom. 345.

of the altered cause of action. In the present case it seems clear to me that the cause of action alleged to exist in the six persons against the defendant for their alleged employment as brokers by him, is clearly different from the alleged cause of action claimed to exist in Motilal, the individual . . . . . The two causes of action being thus entirely different and no leave having been obtained when Motilal, the individual, desired to carry on the suit, this issue must be found against the plaintiff and the suit should therefore be dismissed with costs."

It is clear from these observations of the learned Judge of the Bombay High Court that if an amendment is sought to be introduced in a plaint filed with leave obtained under clause 12 of the Letters Patent and such amendment had the effect of altering the causes of action, then it was necessary to obtain fresh leave. So the implication of this judgment also is that when an amendment is asked for in a suit instituted with leave under clause 12 of the Letters Patent it is open to the party applying for amendment to ask for fresh leave under clause 12 of the Letters Patent and for the Court to grant such leave.

The Calcutta cases to which reference has been made by the learned counsel appearing for the parties may now be dealt with. The first case is that of *Barasat Basirhat Light Railway Co. vs. District Board of the 24 Parganas*(1), which is a decision of Gentle, J. In this case the plaintiff company filed a suit against the defendant District Board for recovery of a sum of Rs. 1,04,000/- under six agreements on 22nd August, 1941. After the trial of the suit commenced, some time in April, 1943 the learned counsel for the defendant raised the question that the agreements upon which the claim was made were not binding or enforceable against the Board on the ground that they were not executed by the Board as required by the Act and the Rules made thereunder. Subsequently both the plaint and the written statement were allowed to be amended and alternative claims made under sections 65, 70 and 72 of the Contract Act were introduced in the plaint by way of amendment. The leave to amend the plaint to include these claims was given on 17th November, 1963. Thereafter when the matter came up for further hearing the learned counsel for the defendant Board raised the contention that the Court had no jurisdiction to try the suit in respect of the claims introduced by way of amendment in the plaint inasmuch as fresh leave under clause 12 had not been obtained at the time of the amendment in the plaint which had been originally filed after obtaining leave under clause 12 of the Letters Patent. Gentle, J. after pointing out that the original claim was only to enforce the terms of the agreement, but the claim which had been introduced by way of amendment were de hors the agreement and sought to enforce other

(1) A.I.R. (1946) Calcutta 23; I.L.R. (1944) 2 Calcutta 101.

rights, referred to the decisions of the Bombay High Court reported in *Rampurtab Samruthroy vs. Premsukh Chandamal*(1) and *Motilal Tribhovandas Choksey vs. Sankarlal Chhaganlal*(2) and after setting out the scope and implications of those decisions held as follows:—

"In my opinion the Court has no jurisdiction to receive, try and determine the claims upon the causes of action in the amendment to the plaint since leave was not previously obtained in respect of those causes of action before the suit in which they are made was instituted in this Court."

Now if the entire process of reasoning in the judgment of the learned Judge in arriving at this conclusion, is analysed, the impression that is conveyed, is that according to the learned Judge an amendment to a plaint raising a new cause of action upon which a claim is made, is not a fresh suit but is an additional claim made in an existing suit, and it is not therefore permissible for the Court to grant fresh leave under clause 12 and allow an amendment of the plaint at a subsequent stage of the suit. This is also the view which appears to have found favour with D. N. Sinha, J. in the case of *Kshitish Kumar Som vs. State of Bihar*(3). After summarizing the various decision to which the attention of the learned Judge had been drawn, the learned Judge at page 286 recorded the following propositions:—

"Where by amendment of a plaint a cause of action is altered or a new cause of action added, it is not a new suit but the old suit in a new form. In such a case no amendment can be ordered if it requires leave to be granted under clause 12 of the Letters Patent at the time of the amendment."

It follows that leave under clause 12 of the Letters Patent cannot be granted in such a case at any stage after the institution of the original suit."

In the case of *Srinathdas vs. Devi Prosad Shaw & anr.*(4). G. K. Mitter, J. after dealing with the decision of Gentle, J. and the argument of hardship put forward by the learned counsel for the plaintiff observed as follows (pages 167—168):

(1) I.L.R. (1890) 15 Bom. 93; A.I.R. (1939) Bombay 345.

(2) A.I.R. (1939) Bom. 345.

(3) (1953) 91 C.L.J. 279.

(4) (1954) 94 C.L.J. 160.

"I agree that hardship may be caused to the plaintiff in these circumstances but I see no reason why I should differ from the judgment of Gentle, J. which I have quoted, as also from the judgment of Kania, J. of the Bombay High Court in *Motilal Tribhovandas Choksey vs. Shankarlal Chhaganlal*(1),, once the case of is altered or added to it cannot in my opinion be said that the reception of the suit continues to be proper without the grant of fresh leave."

The last part of the observation of the learned judge "without the grant of fresh leave" seems to indicate that fresh leave subsequent to the institution of the suit can be granted for the purpose of introducing an amendment of the point and if no such fresh leave is granted at the time of the amendment the reception of the suit although proper at the time of the institution of the suit ceases to be and so becomes improper by reason of 'no fresh leave' having been obtained in respect of the amendment introduced in the plaint. So this learned Judge has construed the decisions of Gentle, J. and of Kania, J. in a manner different from D. N. Sinha, J. In a later decision *Sugandha Pada Bhattacharjee vs. N. M. Mukherjee & ors.*(2), Yaw, J. after dealing with the decisions of the Calcutta and Bombay High Courts to which I have referred and another decision of the Madras High Court reported *S. R. Muthusami Gounder vs. T. Krishnaswami Iyengar and anr.*(3), held that in a suit which is filed with leave under clause 12 of the Letters Patent only formal amendments or other reasonable amendments can be allowed, provided the amendment sought does not affect the jurisdiction assumed by the court originally either by adding to or altering the original cause of action as pleaded in the plaint and no amendment seeking to alter the original of action can be allowed by Court in a suit filed with leave under clause 12, for the simple reason that the question involved is not one of procedure but of jurisdiction. The learned Judge disagreed with the interpretation put on the decisions of Kania, J. and Gentle, J. by Krishnaswami Nayudu, J. in the Madras case.

The very point also come up for consideration in an unreported decision of A. N. Roy, J. in *Ramballas Rameswar vs. Shibarai Narayendas*(4), judgment dated 6th September, 1961. The learned judge placed strong reliance on a Bench decision of this Court reported in *Shankar Dhandhanias vs. Choteylal Dhandhanias*(5), in which S. B. Sinha, J. observed that:—

"It is now established that leave originally obtained at the time of the filing of a suit does not cover an amendment of the plaint. Where a

(1) A.I.R. (1939) Bom. 345 41; I.L.R. 536. (2) A.I.R. (1960) Calcutta 521; 64 C.W.N. 494.  
 (3) A.I.R. (1952) Mad. 533. (4) Suit No. 1457 of 1955 (unreported case).  
 (5) (1949) 84 C.L.J. 200.

defendant is added fresh leave must be obtained even if leave had been obtained when the suit was originally filed. It is contended that there was no change in the cause of action. Even so if new parties are joined against whom it is intended to proceed in the suit and to obtain a decree, the obtaining of the leave is imperative because it is the foundation of the jurisdiction of the Court. The Court gets jurisdiction to decide the suit against parties only if it grants leave which is a condition precedent. No leave was obtained to proceed against the only added defendants and it follows that the Court never got any jurisdiction to make any decree or order against them in the suit."

Relying on this observation and also analysing the Bombay and Calcutta decisions referred to in his judgment, the learned judge has come to the conclusion that under certain circumstances fresh leave under clause 12 of the Letters Patent can be granted in respect of an amendment introduced at a stage subsequent to the filing of the suit which is instituted after obtaining prior leave under clause 12 of the Letters Patent.

The attention of the Court was also drawn to two decisions of P. C. Mallick, J. of this Court reported in *Provabati Kunwar vs. Kaiser Kunwar* (1) *Biswanath Agarwalla vs. Dhapu Debi Jejodia & ors.* (2). In the first mentioned case the learned Judge held that no fresh leave was required for including an alternative relief by way of amendment in the plaint in a partition suit comprising lands partly within and partly outside the jurisdiction of the Court and instituted after obtaining leave under clause 12 of the Letters Patent. But in view of the conflict of decisions on the point the learned Judge took the precaution of granting fresh leave in respect of the amendment. In the last mentioned case where a person was added as defendant at his own instance to a suit filed after obtaining leave under clause 12 it was held by the learned Judge that no fresh leave was necessary.

Such being the state of authorities, I am disposed to think that to accept the argument of the appellants will be to put a very narrow and rigid construction on the wordings of clause 12 and to defeat the true purpose and effect of that clause. Clause 12 sets out the different circumstances under which this High Court can receive try and determine suits in the exercise of its ordinary original civil jurisdiction. One of the circumstances is that if part of the cause of action arises within the local limits of the ordinary original jurisdiction then with the leave of the Court first obtained the Court becomes empowered to receive try and determine the suit. So the granting of leave is a condition precedent to the Court acquiring or becoming vested with jurisdiction in respect of such a suit. Clause 12 deals with the question of jurisdiction only. It does not deal with the procedure regulating the trial and determination of suits. The

(1) A.I.R. (1959) Calcutta 642.

(2) A.I.R. (1960) Calcutta 494.

power of the Court to deal with matters of amendment of pleadings for determining the real question in controversy between the parties is derived from the Code of Civil Procedure. This power of amendment inheres in the Court for trial and determination of suits of every description in respect of which it acquires jurisdiction under clause 12 of the Letters Patent. But as in cases where part only of clause of action arises within jurisdiction or part only of the land is within jurisdiction the obtaining of the leave of the Court is made a condition precedent to the Court assuming or acquiring jurisdiction the judicial decisions have laid down that any substantial or material addition to or alteration of the cause of action as pleaded in the original plaint is dependent on obtaining of prior leave of the Court, inasmuch as the question of amendment and the question of jurisdiction are inextricably linked up in such cases. Similarly when a new party is added to a suit the cause of action is laid as against him for the first time when he is so added and consequently in such a case the obtaining of fresh leave has been held to be imperative. It appears to me that this view accords with reason and commonsense and the decisions which held that leave under clause 12 can be granted by the Court only once at the time of the institution of the suit, and no amendment at all can be allowed of any plaint filed with the leave of the Court have put a wrong construction on the language used in clause 12.

With regard to the nature of amendment asked it is sufficient to point out that the amendment proposed to be introduced cannot be said to be a totally new or inconsistent cause of action. The proposed amendment seeks to set forth certain anterior events which have close relation to, and are connected with the subject matter of the original suit. As I have pointed out already certain assignments and agreements have been introduced by the amendment in order to supply the missing links in the chain of the cause of action to show the origin, devolution and accrual of the cause of action in respect of which the plaintiff firm has brought the suit, out of which the appeal arises.

In my view the order made by G. K. Mitter, J. is right and it should be upheld.

The only other question which has been raised in the appeal is whether an appeal lies from the order allowing the amendment and granting fresh leave under clause 12 of the Letters Patent. Now if the order in the present case had been an order of amendment simpliciter it might very well have been contended that such an order was not an appealable order. Because by a mere order allowing certain amendments or some new grounds of claim to be raised in the pleadings there is no determination of the rights of the parties on

an any question between them. As observed by Kania, C.J. in the case of *Shesh Giridas Shambhag vs. Sunderro*(1):—

“The effect of the amendment only is that the plaintiff will be allowed to raise that Contention. The granting of leave to amend does not amount to admitting that those contentions are valid or that the plaintiff will get the relief because of those contentions. They will be decided at the hearing on the merits of the disputes between the parties. . . . It is only an order in respect of the procedure of the suit . . . . It is however clear that the order for amendment as made in the present case does not in any way deal with the jurisdiction of the Court or affect its jurisdiction.”

Chagla, J in the same case also made similar observations in his judgment. At page 363 the learned Judge started thus:—

“Order 6, rule 17 has nothing whatsoever to do with jurisdiction. It proceeds on the assumption that the Court has the jurisdiction in a suit pending before it to order amendment of pleadings. All that order 6, rule 17 provides is the mode in which the Court should exercise that jurisdiction.”

This view has found favour with this Court. So if the order appealed against in the present case would have been an order of amendment pure and simple this Court would have been inclined to take the view that no appeal lay from such an order. But in the present case the question is further complicated by the fact that fresh leave under clause 12 of the Letters Patent was granted in respect of the amendment as such leave was found necessary in view of the provisions of clause 12 of the Letters Patent. It was held in the case of *De Souza vs. Coles*(2), that an appeal lies from decision of a judge exercising Original Jurisdiction refusing to give leave to institute a suit on the Original Side of the High Court in a case in which the cause of action has arisen in part within the Ordinary Original jurisdiction of the High Court. In the case of *Mudelly vs. Mudelly*(3), an appeal from an order granting leave under clause 12 of the Letters Patent by a learned Judge of the Madras High Court after another learned Judge of Co-ordinate jurisdiction had refused leave in respect of substantially the same cause of action was entertained by the Appellate Court and the order was set aside as being irregular and an abuse of the process of the Court. It is to be noted that no objection was raised in that case as to the competency of the appeal.

In the case of *Hacjee Ismail Hadjee Hubeeb vs Hadjee Mahomed Hadjee joosub*(4), decided so far back as where a suit had been instituted in this

(1) A.I.R. (1946) Bom., 301.

(3) 8 Mad. High Court Report 21.

(2) 3 Madras H. C. Report 384.

(4) (1874) 21 W.R. 303, 13 B.L.R. 91.

Court after obtaining leave under clause 11 of the charter which corresponds to clause 12 of the Letters Patent for setting aside a release and the dependants made an application for the plaint being taken off the file, Macpherson, J. rejected the application. An appeal was taken against the order and the question of maintainability of the appeal was raised before the Appeal Court. The learned Chief Justice Sir Richard Couch in dealing with the question of competency of the appeal observed:—

“It was held by the High Court at Madras in *De Souza vs. Cotes*(1). That an order made under this clause of the charter was subject to appeal. We may not agree in all reasons which the learned Judges of that Court gave for their decision, but we do agree in the conclusion that this is an appealable order. It is of great importance to the parties. It is not a mere formal order or an order merely regulating the procedure in the suit, but one that has the effect of giving a jurisdiction to the Court which it otherwise would not have and it merely be said to determine some right between them, namely, the right to sue in a particular Court and to compel the dependants who are not within its jurisdiction to come in and defend the suit, or, if they do not, to make them liable to have a decree passed against them in their absence.”

These observations of the learned Chief Justice make it abundantly clear that an order made under clause 12 of the Letters Patent is subject to appeal inasmuch as it is not an order merely regulating the procedure of the suit but one which affects the jurisdiction of the Court. So when the question of amendment of the pleading and the question of leave under clause 12 of the Letters Patent are inter-connected or in other words when the question of procedure and the question of jurisdiction are mixed up and one cannot be dissociated from the other, the order dealing with such question of procedure and jurisdiction is in my view an appealable order and it is a judgment within the meaning of clause 15 of the Letters Patent.

In a more recent decision of this Court reported in *Shorab M. Modi vs. Mansata Film Distributors*(2), it has been held relying on the decision of Sir Richard Couch to which I have already referred that an order refusing to rescind a leave granted under clause 12 of the Letters Patent is a judgment and is appealable under clause 15 of the Letters Patent, Chakravarti, C.J. at pages 567-568 relied on the observations of Sir Richard Couch in *Hadjee Ismail's Case*(3) and also referred to decision of the Supreme Court in *Asrumati Devi's Case*(4) and particularly to the observations of the Supreme Court made in connection with the decision of Sir Lawrence Jenkins reported in *Beghorji vs. Gamaji*(5), where the learned Chief Justice expressed the view that an order

(1) 3 Mad. High Court Report 384.

(3) (1874) 21 W.R. 303.

(5) (1904) I.L.R. 29 Bom. 249.

(2) (1957) 61 C.W.N. 559.

(4) (1953) S.C.R. 1159.

refusing to rescind a leave granted under clause 12 of the Letters Patent was a judgment and was appealable as such and Chakravarti, C.J. proceeded to point out that although the Supreme Court did not express any final opinion as to the propriety or otherwise of the view expressed by Sir Lawrence Jenkins the fact remains that the Supreme Court did not disapprove of the decision of Sir Richard Couch and as has himself did not see any reason to differ from the decision of Sir Richard Couch, he agreed with the reasoning expressed in that decision. Thus there is a Bench decision of this Court in which an order refusing to rescind a leave under clause 12 has been held to be a judgment and as such appealable under clause 15 of the Letters Patent and as in my view there is no difference between an order refusing to rescind a leave under clause 12, and order granting leave under clause 12. I am at a loss to understand why the order made in the present case granting fresh leave in respect of the amendment asked for cannot be said to be a judgment from which an appeal lies under clause 15 of the Letters Patent. I hold that the order appealed from is a judgment within the meaning of clause 15 of the Letters Patent and as such the objection as to the maintainability of the appeal must be overruled.

But in view of my finding that the order of G. K. Mitter, J. is right this appeal must fail and it is accordingly dismissed with costs. Certified for two counsel.

The operation of the order of G. K. Mitter, J. dated the 28th March, 1961 will remain stayed till the 16th January, 1962.

**Debabrata Mukherjee, J.:**—I agree in the conclusion reached by my Lord Chief Justice that the appeal should be dismissed but I do so on somewhat different grounds.

Two questions have in the main been debated in this appeal: First, whether in a suit brought with the leave of the Court under clause 12 of the Letters Patent, amendment of pleadings is at all allowable, and if so, whether fresh leave is required. secondly, whether the order giving such leave is appealable.

The plaintiffs, a firm of Commission Agents instituted the suit against the defendants for a decree for a certain sum of money; in the alternative, a claim for accounts was made and a decree for such sum as may be found due on taking accounts was prayed for. The plaintiff firm alleged that part of the cause of action had arisen within the original jurisdiction of this Court and consequently asked for leave under clause 12 to institute the suit. The leave having been granted the suit was taken on file and the defendants put in their written defence. Thereafter fresh leave under clause 12 to amend the cause, title and certain pleadings in the plaint was asked for. The learned trial Judge heard the parties on the proposed amendments and give leave again with liberty to the defendants to file an additional written statement. This order was made on March 28, 1961 against which the defendants have appealed.

The material provisions of clause 12 of the Letters Patent are " . . . . . the said High Court of Judicature at Fort William in Bengal . . . . . shall be empowered to receive, try and determine suits of every description if . . . . . the cause of action shall have arisen either wholly or in case leave of the Court shall have been first obtained, in part within the local limits of the ordinary original jurisdiction of the said High Court. . . . . "

It is plain from the language employed that where only a part of the cause of action has arisen within jurisdiction, the High Court has first to give leave in order to receive, try and determine the suit. The leave has to be given at the time of admission of the plaint and cannot be granted afterwards. The Courts have gone further and held that the decision to give leave or to withhold it, is judicial act and the order giving leave or refusing it, is subject to appeal. That was the view taken as long ago as 1868 in the case of *De Souza and anr. vs. Coles*(1), where it was held that a Judge exercising discretion vested in him by clause 12 of the Charter upon an ex-parte application for leave to bring a suit, acts judicially and his decision is a judgment subject to appeal under clause 15. This view was endorsed by Richard Couch C.J. in the case of *Hadjee Ismail Habib vs. Hadjee Joosub & anr.*(2). It was ruled that where leave was necessary, such leave must be obtained as a condition precedent to the institution of the suit. The order made under clause 12 was accordingly held appealable on the footing that it was not a formal order, or an order merely regulating procedure in the suit, but one which has the effect of giving jurisdiction to the Court which it otherwise would not have. It was explained that a decision giving leave on withholding it amounts to a determination of some right between the parties, namely, the right to sue in a particular Court and to compel the defendants who are not within its jurisdiction to come in and defend the suit, or if they do not, to make themselves liable to have a decree made against them in their absence. This position was reaffirmed in a Full Bench decision of this Court of *Laliteswar Singh vs. Rameswar Singh*(3), where Maclean, C.J. held, on a consideration of the relevant authorities, that the order granting leave to sue under clause 12 of the Letters Patent is a judicial and not merely a procedural or administrative act, the leave has to be granted by a Judge of the Court and it is not competent for the Court to delegate this functions to one of its officers. The leave given creates jurisdiction which determines a right between the parties, namely, the right to sue in a particular Court.

The Supreme Court held in the case of *Asumati Devi vs. Kumar Rupendra Deb Rasgot*(4), that leave granted under clause 12 constitutes the very foundation of the suit which is instituted on its basis. Even a distinction

(1) 3 Madras High Court Report 384.

(2) (1874) 21 W.R. 303.

(3) (1907) 21 I.L.R. 34 Calcutta 619.

(4) (1953) S.C.A. 319.

was made between leave under clause 12 and leave given under clause 13 directing removal of a suit from one Court to another.

It seems clear that the leave contemplated in clause 12 of the Letters Patent must be given before a suit, in which the cause of action has arisen partly within jurisdiction, can be received, tried and determined by the High Court on its Original Side. The leave is a condition precedent which has to be fulfilled before the Court can in a case of this kind assume powers over parties to the dispute and the subject matter of the dispute. Such leave has to be expressly given and cannot be inferred from the mere fact that the suit has been allowed to go on where only a part of the cause of action has arisen within jurisdiction.

If such is the position the question then arises whether amendment of pleadings can be allowed in a suit brought with leave under clause 12. There is no provision in the Letters Patent providing for leave to be given again to amend the pleadings. It is therefore for consideration whether any amendment of pleadings can at all be allowed in such suit, and if allowed, whether fresh leave is required for such amendment.

The Letters Patent by its clause 37 provides for regulation of proceedings in civil cases. It authorises the High Court to make rules and orders for the purpose of regulating all proceedings in civil actions which may be brought before it and says that the High Court shall be guided in making such rules and orders as far as possible by the provisions of the Code of Civil Procedure or of any law by which the code may be altered or amended by competent legislative authority.

In the absence of any direct provision in the Letters Patent, it would not perhaps be wrong to look to the Civil Procedure Code for guidance in the matter. Order 6 of the code deals with pleadings generally and Rule 17 provides that the Court may at any stage of the proceedings allow either partly to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. The Letters Patent itself enjoins reference to the civil procedure code for guidance in the matter of rules to be framed by the Court for regulating its own procedure. Order 49 of the Code expressly exempts the High Court from the operation of certain rules contained in its first schedule. The exemption relates to service of processes, the manner of taking evidence or recording of judgment and orders. Rule 3 enumerates the rules and orders which will not apply to the High Court in its ordinary or extraordinary original civil jurisdiction. It is to be observed that Order 6 which deals with pleadings generally is not one of the orders mentioned in Rule 3 of Order 40. The result is that there is nothing either in Letters Patent or in the code which prevents application of the rules relating to pleadings contained in Order 6. Prima facie it seems right to hold that amendment of pleadings can be allowed in suits

brought with leave under clause 12. The opposite conclusion can only result in deprivation of the right of the suitor to amend his pleadings in such suit.

The contention on behalf of the appellants has been that no amendment of pleadings can be allowed in such suits for the reason that amendments have the effect of altering or adding to the original cause of action upon which leave under clause 12 was asked for and obtained. The argument is that the very notion of amendment is repelled by the condition prescribed in clause 12 which requires the Judge to give leave first and then to receive, try and determine the suit. I agree, leave which confers jurisdiction cannot be given piecemeal; leave once given is given for trial to a close, and cannot be repeated. The Judge when giving leave exercises his judicial mind on the facts making up the cause of action originally stated in the plaint. Broadly speaking, the notion of fresh leave appears to be abhorrent to the concept of leave in clause 12 since such leave constitutes the very foundation of jurisdiction, and jurisdiction cannot be created or conferred in instalment. A concession has, however, been made on behalf of the appellants that if any amendment does not entail substantial alteration of the cause of action, the amendment may be allowed even in such suits.

The argument has been sought to be reinforced by a decision of the Bombay High Court in the case of *Ram Protab and anr. vs. Prem Sukh and ors.*(1), where Telang, J. held on reference to the authorities that since leave under clause 12 is a judicial act which must be held to relate only to the cause of action disclosed in the plaint as presented to the Court at the time of the grant of such leave, no amendment of pleadings can be allowed. The learned Judge felt pressed by the weight of judicial opinion to hold that since the leave affords the very foundation of the Court's power to deal with the dispute, it is not available to confer jurisdiction in respect of a substantially different cause of action which was not judicially considered at the time the leave was granted. This view has found favour with Gentle, J. in this case of *Barasat Basirhat Light Railway Co., Ltd. vs. District Board of 24 Parganas*(2), who also held that leave under clause 12 being a condition precedent to jurisdiction to receive, try and determine the claims contained in the plaint. The Court has no jurisdiction to determine other claims founded upon causes of action in the amendment on the ground that leave had not previously been obtained in respect of the amended pleadings.

In my opinion, these decisions proceed on the assumption that every amendment necessarily implies a complete change of cause of action. As is well known a cause of action means every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to entitle him to a decree; it includes everything which, if not proved, would entitle the defendants to an immediate judgment; it is a bundle of essential facts set forth

(1) (1890) I.L.R. 15 Bom. 93.

(2) A.I.A. (1946) Calcutta 23.

in the plaint and those facts are the media upon which the plaintiff asks the Court to pronounce in his favour. It is equally well known that there may be parts of a cause of action some of which may only be an elaboration of the main facts upon which the plaintiff founds his claim to relief. The Letters Patent itself refers to cause of action arising wholly or in part within jurisdiction. As Hallaway, J. aptly observed in the case of *De Souza vs. Coles*(1), that "the words cause of action may have either the restricted sense of immediate occasion of the action or the wider sense of necessary conditions of its maintenance. In the one sense it is the mere matter of fact the failure of the defendant to do or forbear from doing, to give, or make good that which the plaintiff's right entitles him to inter of fact *plus* the right resident in the plaintiff. Failing the former an injury is inconceivable; failing the latter, the right cannot assume the special shape of an action."

It seems plain that several facts pleaded upon which the claim to relief is founded may well have ancillary facts which or more or less of a subsidiary or explanatory in character. Where therefore an amendment of the pleadings does not introduce an altogether new set of facts which changes beyond recognition the original cause of action, there cannot possibly be any objection to such amendment being allowed in a suit brought with leave under clause 12 of the Letter Patent. Within the limits permitted by the law, there may be several causes of action joined together and trial of such action is a familiar feature of the law of procedure. There are circumstances where such joinder is forbidden; but where, within the limits prescribed, several causes of action are joined which do not bring about multifariousness, joinder is permissible and the suit may well proceed to judgment.

The question whether amendment can be allowed in a given case is always a matter for the exercise of the Courts judicial discretion. Amendments are, as a matter of fact, liberally allowed and Rule 17 of Order 6 expressly provides that a Court may at any stage of the proceedings allow either party to alter or amend his pleadings. Such amendments have of course to be necessary for the purpose of determining the real question in controversy between the parties. The only inhibition against allowing amendments appears to have been indicated by the Judicial Committee in the case of *Mashwe Mya*(2), where it was said that the Court has no power to enable one distinct cause of action to be substituted for another in order to change by means of the amendment the subject matter of the suit, at the same time it was held that all rules of Court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that the full power of amendment must be enjoined and always be liberally exercised. This observation implies that it is not open to the Court to permit altogether a new case to be made. Substantially the same view had been expressed by the Judicial Committee in the

(1) 3 Madras High Court. 381.

(2) (1921) 48 I.A. 214.

earlier case of *Charan Das vs. Amir Khan*(1), that the discretion exercised in allowing an amendment should not be interfered with. It was held that although the power of the Court to amend the plaint in a suit should not be exercised where the effect is to take away from the defendant a legal right which has accrued to him by lapse of time, still there are cases in which that consideration is outweighed by the special circumstances of the case. These observations were endorsed by the Supreme Court in the case of *Leach & Co., Ltd. vs. Jardin Skinner & Co.*(2), in which that Court gave leave to amend the plaint even at that stage by allowing an alternative claim for damages for breach of contract for non-delivery of goods despite the respondent's opposition. It was held that interests of justice required that the amendment should be allowed even though a suit on the amended cause of action was barred by limitation.

It is, in my view, not right to contend that amendment will, when allowed, affect jurisdiction. Clause 12 speaks of leave being given to receive, try and determine a suit. Amendment can only mean additions or alterations to the suit. There can be no question of leave being given to amendments which are by the very nature of things mere additions or alterations to the pleadings in the suit. The leave spoken of in clause 12 gives jurisdiction to receive and determine the suit. There can be no question of leave to amendment under that clause. Under the general law regulating amendments of pleadings, the Court may give leave to amendments being made to pleadings, but such leave controlled and guided by Order 6, Rule 17 has nothing to do with the leave under clause 12 which when obtained enables the party to commence the suit. Leave under clause 12 affects jurisdiction but leave or allowance under Order 6, Rule 17 is entirely procedural; such allowance has nothing to do with jurisdiction. As was observed by Chagla, J. in the case of *Sheshgiri Shanbhag vs. Eunderao*(3) an order for amendment of pleadings does not in any way affect the jurisdiction of the Court. When the Court allows an amendment it proceeds on the basis that the Court has jurisdiction to try the suit and regulate its own procedure by allowing amendment of pleadings. Rule 17 only provides the mode in which the Court should exercise jurisdiction which it possesses. It must therefore be held that jurisdiction and procedure are entirely different categories and the two cannot be confused. Procedure becomes relevant only when there is jurisdiction to regulate it, the former is merely the machinery to reach a decision which the latter condition and authorises.

If such is the result, there can be no question of leave being granted to amendment of pleadings under clause 12 of the Letters Patent. If the proposed amendment is not allowable by reason of its being wholly inept or unnecessary for the purpose of determining the real question in controversy between the parties, it is bound to be disallowed. That disallowance takes place in the

(1) (1920) 47 I.A. 255.

(2) (1957) S.C.R. 438.

(3) A.I.R. (1946) Bombay 261.

exercise of the Courts discretion given to it by Order 6, Rule 17. It can have nothing to do with jurisdiction contemplated in clause 12 of the Letters Patent. I agree there can be no such thing under clause 12 as leave by instalment. Once such leave has been given, the Court acquires jurisdiction over the subject matter the parties to the dispute. In the course of the trial the dispute may take on new aspects in consequence of the amendment allowed; but being an amendment it must be assumed to have passed the initial test that it is related to the main cause of action and necessary to enable the Court to determine the real question in controversy over which the Court has already assumed jurisdiction by reason of the leave given under clause 12. An amendment must, by the very nature of things, be subsidiary to the main facts constituting the cause of action; and once the Court has by its leave given under clause 12, become seized of the dispute, it cannot consider itself disseized or robbed of jurisdiction by reason of the amendment allowed. I cannot conceive that the right of amendment which is a valued right is denied to a suitor who has asked for and obtained leave in terms of clause 12. If it is right to hold that amendments cannot be allowed in a suit brought with leave, that would obviously imply denial of the right of amendment of pleadings and make the rules contained in Order 6 a dead letter. Amendments are made in the course of the trial; but the trial cannot commence until there is already jurisdiction in the Court; and once jurisdiction is there to try the action, the amendments are assimilated to the main pleading upon which leave to receive, try and determine the suit was had and obtained. To hold therefore that amendment requires fresh leave is to say that jurisdiction has again to be created to receive the amendment in order to relate it to the original cause of action upon which the leave was granted. I for one do not see now on principle it could be said that an amendment requires fresh leave under clause 12 except perhaps in one case to which I shall presently refer.

Where for the purpose of addition of parties an amendment is introduced, it has necessarily the effect of enlarging the scope of the suit. The Court acquires jurisdiction upon the added party for the first time when he is brought into the proceeding. The Court's jurisdiction has to be related to the cause of action as much as to the parties to be affected by its decision. In deed, the Court had no jurisdiction over such added party until the amendment was allowed. An order made or decree passed in the suit would not have affected him if he was not a party to it. In such a case it must be held that when the Court acquires jurisdiction upon such added party, there has to be leave given under clause 12 so as to make him amenable to the Courts jurisdiction. For the party thus added, the suit commences when he is brought on the record. But before the Court can exercise jurisdiction over him, there has to be leave given in so far as he is concerned. That seems to be the position in view of section 22 of the Limitation Act which says that where after the insti-

tution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he is made a party. In a case of this kind the suit, in fact instituted earlier, must by a legal fiction be held to have been instituted at the time when he is put into the proceedings and made a party. This view was accepted in the case of *Benoy Sankar Dhandhanias vs. Chhotelal Dhandhanias*(1), when S. B. Sinha, J. who spoke for the Court, held that leave has to be obtained for the addition of parties although the suit has been commenced with leave already obtained under clause 12. This view accords with the principle that leave once given under clause 12 enures, and no further leave is required or can be given when amendments to pleadings have been allowed by the Court. Leave repeated under clause 12 in the course of the suit seems to be repelled by the clause itself, except upon addition of party, when leave becomes imperative, since the Court then acquires for the first time jurisdiction over him. In all other cases amendments when allowed merely adhere to the original cause of action upon which the Judge's mind was exercised when he decided judicially to receive, try and determine the suit.

I am inclined to agree with the view taken by D. N. Sinha, J. in the case of *Kshitish Kumar Some vs. State of Bihar*(2), that where by amendment of plaint a cause of action is added, it is not a new suit but the old suit in a new form. If by 'new form' the learned Judge meant that it is the old suit with certain facts added to the original cause of action, I should have no difficulty in accepting his conclusion. As I understand it, no amendment can be allowed under the rules of pleading if it is of such a character as to alter completely the nature of the original cause of action and make leave under clause 12 imperative. An amendment such as this cannot be allowed under Rule 17 of Order 6; and if such amendment is allowed it would import an altogether new cause of action entirely foreign to the original one, and it would only be fit to be tried separately. In my view, no leave need be asked for when an amendment, properly so called, is made since the Court once seized of the original cause of action is quite entitled to entertain amendments in terms of Order 6, Rule 17 of the Code of Civil Procedure. I agree that where a new party is added, the suit as regards the added party must be deemed to have been commenced on the date he is brought into the proceedings. In such case it is necessary to grant leave under clause 12 in order that the Court may assume jurisdiction over such added party.

The Bombay decision in *Shaw Wallace & Co.*(3), is of little assistance. This was a suit brought with leave was unnecessary. A party had been wrongly added and Chief Justice Jenkins commenting upon it observed that

(1) (1949) 84 C.L.J. 200.

(3) (1905) I.L.R. 30 Bombay 364.

(2) (1953) 91 C.L.J. 279.

leave could not have been given by the Court's officer; as to whether leave subsequent to the admission of a plaint could be given the learned Chief Justice observed that he wished to say nothing.

But another Bombay decision in *Motilal Tribhovandas Choksey vs. Shankarlal Chaganlal*(1), is instructive. Kinia, J. (as he then was) observed that the obtaining of leave under clause 12 being the foundation of the Court's jurisdiction, such leave cannot be given afterwards. The cause of action which was a right to sue vested in six persons in that case was held as being not the same as the right which existed in an individual; when therefore that individual desired to carry on the suit without the leave first had and obtained, the learned Judge thought that the suit deserved to be dismissed.

In the case of *Srinath Das vs. Devi Prosad Shaw*(2). G. K. Mitter, J. accepted the view expressed by Gentle, J. in the case of *Barasat Basirhat Light Railway Co., Ltd.*(3), but added that once the cause of action was altered it could not be said that the reception of the suit "continued to be proper" without the grant of fresh leave. The learned Judge repelled the contention that amendments ought to be allowed in suits brought with leave to prevent hardship and held that a suitor who sought to take advantage of clause 12 cannot be heard to complain if through his own default he omitted to include a ground of relief which was available to him at the time of the institution of the suit. I am unable to agree that there is such a thing as "fresh leave." The leave is the initial thing and when a party is added and leave given, it is also the initial leave so far as he is concerned.

I am unable to agree with Krishna Swami Nayudu, J. who seems to have held in *S. R. Muthusami Gounder vs. T. Krishnaswami Iyenger & anr.*(4), that fresh leave can be granted upon the plaintiffs application to amend his plaint. As I have said, amendments, properly so called, of the original cause of action do not require fresh leave since they are mere amendments. When the Court is once seized of the suit, it is seized for all purposes and it can allow an amendment provided it is necessary for determining the controversy between the parties that I think is the true view since an amendment of pleading is merely procedural, whereas leave under clause 12 is fundamental and jurisdictional.

Law, J. held in *Suganda Mohan Bhattacharjee's case*(5), that only formal amendments or reasonable ones can be allowed if they do not effect the jurisdiction assumed by the Court originally under clause 12. While it is not easy to see what is meant by formal amendment, the learned Judge seems to be inclined to the view that leave once granted cannot be repeated. Mallick, J.

(1) A.I.R. (1939) Bombay 345.

(2) (1954) 94 C.L.J. 160.

(3) A.I.R. (1946) Calcutta 23; I.L.R. (1944) 2 Calcutta 101.

(4) A.I.R. (1952) Madras 533.

(5) A.I.R. (1960) Calcutta 521.

had occasion to deal with the question in a slightly different form in case of *Biswanath Agarwalla vs. Sm. Dhapu Debi Jejodia*(1), in which the learned Judge referred to an earlier decision of his and expressed the view that a suit for land partly situate within jurisdiction which required leave to be obtained under clause 12 of the Letters Patent, fresh leave in amendment was not necessary if the plaint was subsequently amended. But this statement has to be taken with a qualification since the new cause of action related to land situate wholly within jurisdiction; the facts of the case did not quite clinch the issue as to whether fresh leave was necessary consequent upon an amendment.

In a recent unreported decision of this Court in the case of *Ramballav Rameswar vs. Shibaroi Naraindas*(2). Ray, J. held that it is open to the Court to grant fresh leave under clause 12 to amendments of pleadings. At the same time the learned Judge held that amendment is a matter of procedure and procedure is different from jurisdiction, the two being entirely separate concepts. For the reasons given I am unable to accept the view that fresh leave can be given to amended pleadings even though they do not involve addition of parties.

It is plain that judicial opinion has been divided on the question whether an amendment of pleadings requires fresh leave under clause 12. But I think it has to be held that amendment is entirely procedural and has nothing to do with jurisdiction. There is nothing in the Letters Patent which will encourage the view that in a suit brought with leave under clause 12, the suitor is to be deprived of the right to amend his pleadings where such amendment can be properly allowed. In my view, he has that right within the limits of Order 6, Rule 17. This is essentially a procedural right which has nothing to do with jurisdiction which leave under clause 12 confers. For amendments, he does not require leave again under clause 12. In deed, jurisdiction cannot be acquired in instalments and the question of leave under the clause during the pendency of a suit can only arise when a new party is brought into the proceeding by way of an amendment. But in such case it will not be leave repeated, but only leave given, since by such leave the Court acquires jurisdiction for the first time. In the present case counsel for the appellants conceded that in substance there has been no amendment by addition of parties. The question need not therefore be pursued and the effect of such inconsequential amendment need not be considered.

The other main question debated relates to the appealability of an order giving leave to amend the pleading. An order giving leave or refusing leave under clause 12 or even refusing to rescind the leave given has been held to be appealable under clause 15 of the Letters Patent. In *De Souza vs. Cole*(3), the decision proceeds on the footing that an appeal lies from the decision of

(1) A.I.R. (1960) Calcutta 495.

(2) Suit No. 1457 of 1955 (unreported case).

(3) ( ) 3 Madras H. C. Report 384.

a Judge exercising original jurisdiction refusing to give leave to institute a suit in which the cause of action has arisen in part within the ordinary original jurisdiction of the High Court. The decision in *Hadjee Ismail Habib's case*(1) also proceeds on the same footing. The decisions have turned on the construction put upon the word "judgment" under clause 15 and it has generally been held that the word "judgment" must be taken to mean a decision which determines some liability affecting the merits of the controversy between the parties. It is unnecessary in the present case to elaborate this aspect of the matter since the immediate question before us is one of appeal from an order allowing an amendment. The Civil Procedure Code does not allow an appeal from an order under Rule 17 or Order 6. But the question may arise in another form. If an amendment requires fresh leave under clause 12, the order granting such leave or refusing it, may attract a right of appeal. In the view I have taken amendments properly allowed under Rule 17 of Order 6 being entirely a matter of procedure does not relate to jurisdiction and consequently no question arise of an order permitting or refusing such amendments being held appealable. But even then it may perhaps be argued that such order amounts to a decision affecting the rights of a suitor. This aspect of the matter was considered at some length in the case of *Narendra Nath Dutt vs. Jitendra Nath Dutt*(2) by Chakravarti, C.J. who held that the word "judgment" in clause 15 of the Letters Patent must be taken to mean a decision on a question touching the merits of the controversy between the parties. A distinction was made between controversy about the ground upon which such rights are asserted or denied. Where a plaint is properly allowed to be amended, it merely means that the plaintiff has been permitted to include a new ground of relief; an order permitting such amendment decide nothing, affects no rights and curtails no claim of the defendant to challenge the new ground. The effect of such an order is merely that the plaintiff is allowed to make a claim and it does not mean that the claim has been rightly made. It has accordingly been held that the order permitting amendment is merely an order regulating procedure of the Court regarding the manner in which the parties will state their cases with the consequence that no substantive rights are thereby affected. The learned Chief Justice pointed out that if substantive rights which are the rights in controversy between the parties to the suit are not affected by an order permitting an amendment, such order cannot amount to a 'judgment' and therefore cannot be held to be appealable. It was therefore held that an order allowing an amendment of the written statement to raise the plea that the suit was barred by limitation and that the plaintiff was not entitled to succeed on the ground of adverse possession was not "judgment" within the meaning of clause 15 of the Letters Patent and was therefore not appealable. I respectfully agree with this view.

(1) (1874) 21 W.R. 303.

(2) A.I.R. (1959) Calcutta 62.

An order of amendment of pleading is not by itself appealable and in my opinion no question of leave under clause 12 of the Letters Patent arises in such case, since leave under that clause being a matter of jurisdiction involves decision of some kind affecting the merits of the controversy. But amendment of pleadings being entirely procedural, an order allowing or refusing it decides nothing, does not affect the merits of the controversy and is consequently not appealable except where jurisdiction is assumed over added parties by leave being given under clause 12 of the Letters Patent.

I would therefore dismiss the appeal.

*Appeal dismiss.*

N. C. S.

### ORIGINAL CIVIL

*Before the Hon'ble Mr. Justice Banerjee.*

NANI BALA GHOSH

*Vs.*

COMMERCIAL TAX OFFICER, HOWRAH.

Civil

1962

February, 22.

*Bengal Finance (Sales Tax Act, 1941 (Bengal Act VI of 1941), Section 11—Books of account if may be discredited by mere absence of cash memos or bills for sales, if otherwise free from discrepancy—But judgment assessment, if may be made on pure guess or without reference to any evidence or material—Constitution, Article 226—Assessment quashed by certiorari, if may be basis of certificate proceeding.*

If discrepancy cannot be discovered or detected from the books of account of a dealer, the absence of cash memos and bills for Sales will not necessarily discredit such account books, particularly when the type of business carried on by the dealer, namely retail Sale nonta-khabar (Snacks) or Sweets, does not appear at all to use cash memos.

In making a best judgment assessment under Section 11. of the Bengal Finance Sales Tax) Act, 1941, the Commercial Tax Officer is not entitled to make a pureguess and to make an assessment without reference to any evidence or material at all, nor must be proceed on bare suspicion or make an arbitrary assessment.

When an assessment is quashed by certiorari, no certificate proceeding can be taken on the basis of such assessment.

The material facts will appear from the judgment:—

Ranadeb Chaudhuri, Bikash Sen, Taher Ali, S. Bhattacharjee—*Counsel for the Plaintiff.*

K. C. Mukherjee—*Counsel for the Defendant.*

The judgment of the Court was as follows:—

Matter No. 200 of 1961.

**Banerjee, J.:**—One Dulal Chandra Ghose, since deceased, was the sole proprietor of a business known as "Messrs. Dulal Chandra Ghose" and in the said business was a dealer in milk, cooked foods (including salted snacks or nonta-khabar). Curd and Indian Sweets made of preparation or products of milk cereals, pulses and sugar. The said Dulal Chandra Ghose was registered as a dealer under the Bengal Finance (Sales Tax) Act, (hereinafter referred to as the 'Act') and he used to file quarterly returns under the Act in his said business. During his life time he had filed returns for the four quarters ending with Ashar, Aswin, Pous and Chaitra 1365 B.S. In the four quarterly returns taken together, the gross turnover was shown at Rs. 1,88,312-34 nP. Out of that, deductions, under Section 5(2) (a) (i) of the Act, were claimed at Rs. 1,28,464-55 nP. and the taxable turnover was shown at Rs. 59,847-79 nP. On the amount of the taxable turnover the said Dulal Chandra Ghose paid a sum of Rs. 2,857-70 nP., as admitted sales tax as he thought, he was required to do under the Act. The assessment, however, was not completed during his lifetime.

Dulal Chandra Ghose died intestate on May 22, 1960, leaving him surviving his sole widow, Nanibala Ghose (Petitioner No. 1), and his only daughter, Sibani Ghose (Petitioner No. 2) as his sole heirs and legal representatives. As between the two petitioners there was a deed of partnership executed and the same trade was restorted by them at the same place under the same trade name. A copy of the partnership deed was filed before the Commercial Tax Officer, Howrah charge, and the petitioners prayed for fresh registration as dealers in the said partnership business. The prayer was allowed and the partnership was registered as a dealer under the old registration number. Hw. 1652A.

The Commercial Tax Officer doubted the correctness of the quarterly returns for the year 1365 B.S. filed by Dulal Chandra Ghosh. He, therefore, issued a notice in form VI, under Section 11 and Section 14(1) of the Act, calling upon the partnership to produce books of accounts together with any objection which it might wish to prefer and any evidence which it, might wish to prefer and any evidence which it, might wish to adduce in support thereof. The petitioners felt that the returns filed by Dulal Chandra Ghosh and the taxable turnover admitted by him were done through misunderstanding and mistake and they further felt that from out of the gross turnover the entire amount was deductible, under Section 5(2) (a) (i) of the Act, being sale of goods declared tax-free under Section 6 of the Act, with the result that the taxable turnover would become nil. The petitioners, therefore, caused revised returns to be filed in which the amount of gross turnover was shown at Rs. 1,88,349-35 nP. and the whole of the said amount was claimed as deduction, under Section 5(2) (a) (i) of the Act. The aforesaid returns were filed under

the provisions of Section 10(4) of the Act. In an explanatory statement, also filed before the Commercial Tax Officer, the petitioners showed the break up of the gross turnover in the following manner:—

|                          |     |     |                     |
|--------------------------|-----|-----|---------------------|
| (1) Sale of Nonta Khabar | ... | ... | Rs. 84,098-00 nP.   |
| (ii) Sale of Sweets      | ... | ... | Rs. 65,024-12 nP.   |
| (iii) Sale of Curd       | ... | ... | Rs. 22,414-73 nP.   |
| (iv) Sale of Milk        | ... | ... | Rs. 16,812-50 nP.   |
|                          |     |     | <hr/>               |
|                          |     |     | Rs. 1,88,349-35 nP. |
|                          |     |     | <hr/>               |

The reasons why the petitioner contended that the taxable turnover would be nil were:—(1) that salted snacks or *Nonta Khabar* were cooked food other than cakes, parties and sweetmeats and were exempt from taxation under Section 6 of the Act, (2) Milk and its preparation curd were also so exempt, (3) Indian sweets prepared with milk products or preparations, cereals, pulses and sugar or with one or more of them did not come under the category of sweetmeats and were also so exempt.

The Commercial Tax Officer did not accept the revised returns filed on behalf of the petitioners and also did not accept the claim for deduction made by the petitioners, excepting for salted snacks or *nonta khabar*. His reasons for so doing are quoted from the assessment order:—

(1) "It is however, seem that the dealer earned a gross-profit of about 10 per cent of sales only during the period under assessment which is unusually low for a manufacture of sweetmeats and *nonta khabar*. In my opinion the gross profit should be in the neighbourhood of 20 per cent of sales at least. The dealer fails to explain satisfactorily the reason for this low rate of gross profit except in very general terms such as rise in cost of raw materials. Taking these into consideration. I think that there has been a suppression of 10 per cent of sale which comes to Rs. 18,834-00. I, therefore entance the G. T. of the dealer by Rs. 18,834-00."

(2) "I went through the dictionary meaning of sweetmeats in the Chambers Dictionary which reads as follows: 'shaped morsel of confectionary usually consising chiefly of sugar and chocolate.' In the context of the above definition I find no reason, why it should disagree with "Sandesh" and "Rasogolla" etc., prepared by the dealer. So I did not find any substance in the dealer's contentions."

(3) "But having regard to the fact that the dealer is a seller of *nonta khabar* also, which is apparent. I, allow an exemption of 50 per cent of the total sale of Rs. 1,03,591-67 nP. under section 5(2) (a) (i) of the B.F. (S.T.) Act, 1941."

The propriety of the order is being disputed before me in the Rule.

Mr. Ranadev Chaudhuri, learned Advocate for the petitioners, made a three-fold contention in support of this Rule. He contended, in the first place, that the assessment order was a guess work and not a best judgment assessment. He contended in the next place that milk and curd, which latter was milk product or milk preparation, were exempt from taxation under the Act, as much exempt as cooked food like *nonta khabar*. The Commercial Tax Officer was wrong in deducting the sale price of *nonta khabar* only from the gross turnover and not the sale price of milk and curd also. He contended lastly, that Indian sweets like *sandesh* or *rosogolla* or the other varieties of sweets sold by the petitioners fell within the category of cooked food and were not sweetmeats and such were exempt from taxation.

The first two branches of the contention advanced by Mr. Chaudhuri are certainly contentions of substance. The assessment order of the Commercial Tax Officer from several infirmities. He proceeded to enhance the amount of the gross-turnover by 10 per cent on the theory that a gross-profit of 10 per cent of sales was unusually low for a dealer in sweets and *nonta khabar* and that the gross-profit should be in the neighbourhood of 20 per cent of the sale. The Commercial Tax Officer was not taking either income or profit. The business was to assess tax on sales. Why he concerned himself with the inadequacy of the percentage of profit is not clear. Assuming for the sake of argument that the above consideration was relevant for the purpose of checking the correctness of the gross-turnover, it does not appear how he arrived at the conclusion that there must have been a suppression of 10 per cent of the sales figure. Then again he deducted the sale price of *nonta khabar*, namely a sum of Rs. 84,098-00 nP., from the gross turnover on the ground that the same fell within the category of cooked food which was exempt from taxation but he did not deduct from the gross turnover the sale price of milk namely, a sum of Rs. 16,812-00 nP., which was equally exempt from sale tax. Lastly, he allowed an exempt of 50 per cent only out of Rs. 1,03,591-67 nP. under section 5(2) (a) (i) of the Act, without disclosing how he arrived at the percentage of the exemption or at the figure Rs. 1,03,591-67 nP.

In the affidavit in opposition, filed on behalf of the respondent Commercial Tax Officer, an additional reason is given as to why the gross-turnover was increased by 10 per cent. I quote below the relevant extract from the affidavit-in-opposition:—

" \* \* \* I state that the gross-turnover was increased in view of the fact that no Cash Memo or Bill for sales of sweetmeats was maintained by the business and the rate of gross-profit shown was very low and as such the gross-turnover of the business as stated in the return could not be accepted as correct. I further state that the gross turnover was increased by 10 per cent and exemption was granted in respect of sale of articles which is generally known as *nonta khabar*, as it does not fall within the category of "sweet-meat."

The absence of cash memo or bill for sales, as a ground for disbelieving the gross-turnover, was an ornamentation introduced for the first time in the affidavit in opposition. The assessment order does not show that the books of account of the dealer were disbelieved on that ground. On the other hand the following passage from the assessment order reveals that the books withstood the scrutiny of the Commercial Tax Officer:—

"Books of account of the dealer are examined and the sale as per Khatian folio 5 (signed) is found to agree with the G.T. as per return. Test check of purchases with reference to Regr XXIII and counterfoils of Decln. Form XXIV, do not reveal any discrepancy."

If discrepancy could not be discovered or detected from the books of account, it is difficult to visualise why the absence of cash memos and bills for sales would necessarily discredit the accounts books. This is particularly so because it does not appear that the type of business carried on by the petitioners at all use cash memos in retail sale of *nonta-khabar* or sweets.

The Commercial Tax Officer was proceeding under section 11 of the Bengal Finance (Sales Tax) Act. In making a best judgment assessment, the Commercial Tax officer is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. He must not proceed on bare suspicion and must not make an arbitrary assessment.

Dealing with similar provision as to best judgment assessment under the Indian Income Tax Act, Lord Russell of Killowen observed in the case of *Income Tax Commissioner vs. Badridas Ramrai shop*(1):

"The officer is to make an assessment to the best of his judgment against a person who is in default as regards supplying information. He must not act dishonestly, or vindictively or capriciously, because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment and for this pur-

(1) (1937) I.L.R. 64 I.A. 102.

pose he must, their Lordships think, be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous returns by and assessments of the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate, and though there must necessarily be guesswork in the matter, it must be honest guess-work."

The same view was reiterated by the Supreme Court in *Dhakeswari Cotton Mills Ltd. vs. The Commissioner of Income Tax, West Bengal*(1), in the following language:—

"We are in entire agreement with the learned Solicitor-General when he says that the Income Tax Officer is not fettered by technical rules of evidence and pleadings, and that he is entitled to act on materials which may not be accepted as evidence in a Court of law, but there the agreement ends; because it is equally clear that in making the assessment under sub-section (3) of section 23 of the Act, the Income-tax officer is not entitled to make a *pure guess* and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment under section 23(3). The rule of law on this subject has, in our opinion been fairly and rightly stated by the Labour High Court in the case of *Seth Gourmukh Singh vs. Commissioner of Income Tax, Punjab*(2).

Also the same view was applied by the Supreme Court, to assessment of Sales Tax Act, in the case of *Messrs. Raghubar Mondal Harihar Mondal vs. The State of Bihar*(3) and S. K. Das, J. observed:—

"No doubt it is true that when the returns and the books of account are rejected, the assessing officer must make an estimate, and to that extent he must make a guess; but the estimate must be related to some evidence or material and it must be something more than mere suspicion. To use the words of Lord Russell of Killowen again, "he must make what he honestly believes to be a fair estimate of the proper figure of assessment" and for this purpose he must take into consideration such materials as the assessing officer has before him, including the assessee's circumstances, knowledge of previous returns and all other matters which the assessing Officer thinks will assist him in arriving at a fair and proper estimate.

(1) (1955) 8.C.A. 96.  
(3) (1958) S.C.A. 852.

(2) (1944) I.T.R. 393.

In the case under our consideration, the assessing officer did not do so, and that is whether the grievance of the assessee arises."

The legal position being such as indicated above, I have to hold that both in increasing the gross-turnover by 10 per cent, or in deducting only 50 per cent of sale, taken as amounting to Rs. 1,03,591-67 nP. the Commercial Tax officer acted arbitrary, without any material in support of his action and on bare suspicion. He made his position worse in trying to buttress up his judgment by introducing new grounds in the affidavit-in-opposition, namely, the absence of cash memo and bill of sales, which ground of suspicion he did not even reveal in his assessment order.

Also he was wrong in not deducting the sale price of milk, along with the sale price of *nonta khabar*, both of which were exempt from taxation under section 6 read with the Schedule to the Act.

I now turn to the other branch of the argument of Mr. Chowdhuri, namely, whether curd and Indian sweets fall outside the description of sweet-meats, which are liable to taxation. This requires an examination as to the recipes for preparation of curd and the different variety of sweets sold by the petitioners and mentioned in annexure 'A' to the petition. The materials before me are not sufficient to arrive at the decision that they satisfy the definition of the dictionary meaning of sweetmeats.

Since I hold that the judgment of the Sales Tax officer was not a best judgment assessment and that he was wrong in not allowing the allowable deductions, for example, the sale price of milk I have to quash the order and send back the case to the Commercial Tax Officer for assessment according to law. I allow liberty to the petitioners to agitate the question that Indian sweets are not sweetmeats, before the Commercial Tax Officer at the rehearing.

This rule is made absolute. Let a writ in the nature of *certiorari* issue quashing the assessment. The case will now go back to the Commercial Tax Officer for assessment according to law. There will be no order as to Costs.

Since the assessment is quashed no certificate proceedings can be taken on the basis of the said assessment. The respondent certificate officer must not take further steps in execution of the certificate. The security furnished by the petitioner in this rule may now be refunded to the solicitor for the petitioner.

Rule made absolute.

## CIVIL REVISION

Civil

*Before the Hon'ble Mr. Justice Banerjee.*

1962

AMIYA PROVA DAS GUPTA

January, 29.

Vs.

FIRST LAND ACQUISITION COLLECTOR &amp; ORS.

*West Bengal Premises Requisition and Control (Temporary Provisions) Act, 1947 (West Bengal Act V of 1947)—Application of—Public Society or institution or body, tests of—Public purpose, meaning of—If justiciable—Facts to be established, when requisition is made for body already in occupation of requisitioned premises—Mala fides.*

A society formed under the societies Registration Act, 1860, need not necessarily be a public society, and may be a private society of the persons forming the society.

Exemption granted in respect of donations to funds or institutions established for charitable purposes (including education) under section 15B of the Indian Income Tax Act, 1922, does not convert the institution itself into a public institution, if such institution is not otherwise a public institution to also is the case with exemption from payment of amusement tax.

The expression "public purpose" include purposes for advancement of public prosperity, public welfare and public convenience. The word "public" connotes the general public as well as a section of the public. A purpose may be a public purpose even though. The purpose does not benefit all the members of the public, but only a section of it.

In the matter of acquisition or requisition property for a private individual or a private body, there may be a public purpose involved, provided the acquisition or requisition ultimately serves a public purpose, i.e. a purpose which aims at serving the general interest of the community or a section thereof, as opposed to a particular interest of an individual or a private body.

A requisition of premises for a private dancing and music school may be a public purpose if it subserves a public interest. But because the institution is a dancing and music school, a requisition for its purpose need not necessarily be a public purpose.

The existence of a public purpose for requisition under the West Bengal Premises Requisition and Control (Temporary Provisions) Act, 1947, is justiciable before a Court of law. It is necessary to establish why it became necessary to requisition the portion of the premises for the Institution which was already in occupation of the requisitioned portion of the premises.

If the real reason for the requisition was helping a tenant private body in its quarrel with the landlord, the purpose of requisition cannot be a public purpose.

The material facts will appear from the judgment:—

Prodyat Kumar Banerjee—for the Petitioner.

N. C. Chakravarty with Susil Kumar Banerjee—for the Opposite Parties 1 to 3.

Smiriti Kumar Roychowdhury—for the Opposite Party No. 4.

\* Civil Revision case No. 9313/1959.

The judgment of the Court was as follows:—

**Banerjee, J.:**—The petition is the trustee of Premises No. 133B, Shyama-prosad Mukherjee Road, Calcutta, which is a trust property.

According to the petitioner she let out part of the premises in the ground floor to her son Sunil Kumar Das Gupta, opposite party No. 5 in this Rule who in his turn sub-let one hall and one room, out of the portion let to him, to Naranarayan Ghosh, opposite party No. 4.

Naranarayan Ghosh, however, in his affidavit in opposition, denies the case as made by the petitioner. He says that he is the Secretary of Naranarayan Institute of Culture, an institution for the teaching of dancing and music to girls. In such capacity, he obtained a leave from month to month of one hall, one room, a privy and a bath, in the ground floor of premises No. 133B, Shyama Prosad Mukherjee Road, from the petitioner directly, some time in the year 1952. He further says that the leave was taken for accomodation of Naranarayan Institute of Culture, an institution registered under the societies Registration Act and aided by the Education Department of the State Government as an institution for imparting education in music and dancing. He makes a definite case that the tenancy consisted not only of a hall and a room but also of a privy and a bath.

By an order made under section 3(1) of the West Bengal Premises Requisition and Control (Temporary provisions) Act, 1947, one hall, one room, one privy and a bath, in occupation of Naranarayan Institute of Culture was requisitioned for a public purpose. The order bears the date November 7, 1958. In the affidavit in opposition of the respondent Land Acquisition Collector the nature of the public purpose is admitted to be accomodation of the Naranarayan Institute of Culture, which is a public institution for training of dancing and music.

There is considerable dispute as to whether the both room was in occupation of the Naranarayan Institute of Culture. According to the petitioner there was no bath room included within the tenancy. According to the affidavit in opposition of Naranarayan Ghosh opposite party No. 4, the bath room formed part of the tenancy. The Land Acquisition Collector, in his affidavit in opposition, states that the possession of the bath room was taken on November 7, 1958 and was made over to the institution but subsequently the petitioner forcibly dispossessed the allottee institution and locked the bath rooms and privy under requisition. He goes on to say further:—

“ A notice under section 4(1) (a) of the Act was served on her on 24-12-58 directing her to hand over possession of the said bath and privy

by 5-1-59. The petitioner refused to accept the said notice and the same was therefore, served by hanging on the outer-door of her residence. But in spite of service of the said notice by hanging the petitioner did not hand over possession of the bath and privy and these were kept under lock and key. As these difficulties and inconvenience in the running of the said school meant for girls, Government by an order dated 3-3-59 directed the First Land Acquisition Collector to take over possession of the said bath and privy under section 9 of the Act, with police help.

Accordingly possession of the privy and bath was taken over by breaking open the lock on 5-3-59 and was made over to the said Naranarayan Institute of Culture. It was then found that the bath room had been completely demolished by the petitioner. She was, therefore, served with a notice dated 27-5-59, under section 4(1) (b) of the Act by registered post to reconstruct the bath room which was intentionally demolished by her during her temporary forcible occupation, with the object of creating inconvenience to the school and to force the Government to releave the property from requisition."

The statement as to demolition of bath room is not expressly denied in the affidavit in reply, although there is a general statement in the said affidavit that there was no bath at all.

Aggrieved by the order of requisition and the subsequent order for reconstruction of the bath room the petitioner moved this Court, under Article 226 of the Constitution praying that the two orders be quashed and the respondents be restrained from enforcing the said two orders against her. She obtained the present Rule

Mr. Prodyat Kumar Banerjee, learned Advocate for the petitioner, argued a three-fold proposition for any consideration. He contended, in the first place, that Naranarayan Institute of Culture was a private profit-making institution and requisition for the purpose of such an institution cannot be a public purpose, justifying requisition under the Act. He contended, in the next place, that Naranarayan Institute of Culture was already in occupation of the requisitioned premises excepting the bath room and there could be no imaginable necessity for accommodating the institution in the premises already occupied by it. He contended lastly that the bath room formed no part of the tenancy and further that under the Act no order for reconstruction of the bath room could be made.

In trying to repel the first two branches of the argument made on behalf of the petitioner, Mr. Nirmal Chandra Chakravarti, learned Government pleader contended that the Institute was a public institution for training of dancing and music and that requisitioning for the purpose of such an institution was a public purpose, within the meaning of the Act. In support of his contention that the institution was a public institution he submitted that inasmuch as the Institute was registered under the Societies Registration Act, 1860 and exempted, by the Income-tax Department under Section 15B of the Indian Income-tax Act and also recommended for exemption, by the Education Department, from payment of amusement tax in respect of its drama performances, it must be a public institution. He also submitted, relying on a passage in Stroud's Judicial Dictionary, Vol. 3, page 2392, that all libraries, museums, institutions for the promotion of science and art, colleges and schools, were public institutions and Naranarayan Institute of Culture being an institution for promotion of art was undoubtedly a public institution.

The argument made by Mr. Chakrabarti is not very well conceived. Under Section 1 of the Societies Registration Act, 1860 any seven or more persons associated for any literary, scientific or charitable purpose, or for any such purpose as described in Section 15 of the Act itself, may, by subscribing their names to a memorandum of association and filing the same with the Registrar of Joint Stock Companies form themselves into a society under the Act. A society formed under the Societies Registration Act need not necessarily be a public society. It may be a private society of the persons forming the society. Therefore, the fact that the Institute is a registered society is not a relevant circumstance. Then again, exemption granted in respect of donations to funds or institutions established for charitable purposes (which includes education), under Section 15B, of the Indian Income-tax Act, does not convert the institution itself into a public institution, if such an institution is not otherwise a public institution. So also is the case with exemption from payment of amusement tax. The passage from Stroud's Judicial Dictionary, relied on by Mr. Chakrabarti, is to the following effect.

"Public institutions, such as libraries, museums, institution for the promotion of Science and Art, Colleges and Schools" Section 2 Charitable Gifts, Duties Exemption (Newzealand) Act, 1883".

I do not understand how the illustration given in the Newzealand Act helps Mr. Chakravarty. Libraries, museums, institutions for promotion of science and art, colleges and schools may be public institutions but the passage relied upon by Mr. Chakravarty, does not support the proposition that all libraries, museums, institutions for promotion of science and art, colleges and

schools must be, by description alone, public institutions. The tests relied upon by Mr. Chakravarty are not very relevant, as I have already observed.

The question when and how an educational institution becomes a public institution is not free from difficulty. Dealing with public school Fry, L. J. observed in the case of *Blake vs. The Mayor and citizens of the City of London*(1)

It seems to me that it would be unwise to endeavour to lay down any definition in the sense of saying what would or would not be a public school in all cases; but I think that the school in this case has certain characteristics which denote a public school. It has a perpetual foundation; a portion of its income is divided from charity; it is managed by a public body; no private person has any interest in the school; no profit was or is in the contemplation of the founders or managers, and, lastly, the object of the school is the benefit of a large class of persons. All these circumstances concurring, I think this institution may be said to be a public school."

And in the case of *Dilworth vs. The Commissioner of Stamps*(2), Lord Watson observed:—

"School founded or maintained by the community, and managed by representatives, are clearly public, while schools conducted by individuals for their own emolument are as clearly private. All schools, whether public or private in the strictest sense of the words, which have a reasonably large attendance of scholars have one feature in common. They give instruction to the public, or, in other words, to the children of different sections of the public, and the character of the school as public or private, must depend, not upon the scholars to whom education is given, but upon the terms on which and the circumstances in which education is given.

\* \* \* \* \*

Their Lordships have come to the conclusion not without hesitation, owing to the view taken by the Courts below, that the ulster Institute, as designed by its founder, does answer the description of a public institution such as a school. It appears to them that, if the testator had directed his trustees forthwith to hand over the administration and management of the ulster-Institute to a public body in New Zealand, or if he had made his bequest directly to such public body for the same purposes, the

(1) (1887) 19 Q.B.D. 79 to 82.

(2) (1889) A.C. 99 (108-109).

institute would necessarily have been regarded as a public and not as a private institution. What he has directed to be done is in substance the same thing. His trustees to whom he has delegated the duty of building the institute and of superintending its administration, are his trustees in this sense only—that he appointed them. They have no personal interest in the residence, which they hold only for behalf of those children, members of the public, whom he has directed them from time to time to select as the beneficiaries under the trust. The bequest is an educational endowment in perpetuity, and the beneficial interest in it is not vested in any private person, but belongs inalienably to the public. Such being the character of the charity founded by the testator their Lordships do not think that the inmates of the Dilworth Institute could with propriety be described as the recipients of private education.”

None of the distinguishing features mentioned in *Dilworth's case* (Supra) was pleaded or established in respect of the Institute, with which I am concerned in this case. I, therefore do not find any substance in the argument of Mr. Chakravarty that the Institute is a public institution.

Faced with this difficulty Mr. Chakravarty took a modified stand and contended that although the Institute may not be a public institution yet then it was subserving the cause of public education in a particular branch of art and as such requisition for its purpose was public purpose.

The expression public purpose is not easy to define. In the case of *State of Bihar vs. Kameswar Singh*(1), the Supreme Court very oppositely observed:—

“The definition of the expression ‘public purpose’ is elastic and takes its colour from the Statute in which it occurs, the concept varying with the time and state of society and its needs.”

The expression ‘public purpose’ includes purposes for advancement of public prosperity public welfare and public convenience. The word ‘public’ connotes the general public as well as a section of the public and a purpose may be a public purpose even though the purpose does not benefit all the members of the public but only a section of it.

In the matter of acquisition or requisition for a private individual or a private body, there may be a public purpose involved provided the acquisition or requisition ultimately serves a public purpose. But it must always be borne in mind that whatever public purpose may mean, it must involve a purpose which aims at serving the general interest of the community

or a section thereof as opposed to a particular interest of an individual or a private body. A requisition of premises for a private dancing and music school may be a public purpose. If it sub-serves a public interest. But because the institution is a dancing and music school, a requisition for its purpose need not necessarily be a public purpose. If the institution is a private profit making institution, a requisition of premises for its private purposes should not be made under the Act, for the simple reason that it involves no public purpose.

It is now well settled that the existence of a public purpose for requisition under the Act is justiciable before a Court of law. (vide *Satya Narayan vs. State of West Bengal*(1)). From the facts disclosed in the affidavit in opposition it is difficult for me to hold, without more, that the requisition was for a public purpose. The purpose disclosed in the affidavit in opposition of the Land Acquisition Collector was the purpose of providing accommodation for the Naranarayan Institute of culture. But that Institution was already in occupation of the requisitioned portion of the premises. The Land Acquisition Collector in his affidavit in opposition does not say why it became necessary to requisition the portion of the premises of which the Institute was already in occupation as a tenant. Naranarayan Ghose, opposite party No. 4, in his affidavit in opposition however, states as follows:—

“Some time in August, 1958 the opposite party No. 5, Sunil Das Gupta, (Son of the petitioner) threatened to oust the school from the premises and even broke the lock of the bath room causing tremendous inconvenience to the girl students and the staff for which a criminal case under section 144 Criminal Procedure Code was started and he was restrained under section 144 for two months. Being apprehensive of the threatening attitude of the said Sunil Das Gupta and his attempts to cause inconvenience to the staff and more particularly to the girl students by preventing them from using the bath room which was exclusively used by the school, and in order to save the school from ruination the deponent approached the Government to requisition the portion of the premises in which the school was running.”

Mr. Chakravarty, learned Government Pleader, himself relied on the said passage of the affidavit in opposition of Naranarayan Ghose, as disclosing the true reason behind the requisition. That falsifies the reason for the requisition, namely, securing accommodation for the Institute as disclosed in the affidavit in opposition of the Land Acquisition Collector.

If the real reason for the requisition was helping a tenant private body

(1) (1957) 61 C.W.N. 420.

in its quarrel with the landlord, the purpose of requisition cannot be a public purpose. This is all the more so, because I am not sure, on the materials before me, who was actually at fault in the quarrel.

On the materials before me I am also not satisfied that the Naranarayan Institute of culture is not a private profit-making concern, I cannot, therefore, hold that the requisition for its purpose was a public purpose.

Mr. Chakravorty strenuously argued that the order for requisition was made on November 7, 1958 and the Rule was obtained on September 22, 1959. This delay, he contended, disentitled the petitioner from obtaining any relief by way of a high prerogative writ. This argument ignored the fact that the son of the petitioner, Sunil Das Gupta, claiming to be a tenant of the first degree of the disputed premises moved against the order as far back as May 12, 1959 and obtained a Rule being Civil Rule No. 1455 of 1959. In that Rule the petitioner was made a party respondent, on September 21, 1959, without prejudice to any other application which the petitioner may make. Thereafter she made the present application on the very next day. For the reasons aforesaid I do not make much of the argument based on delay.

In the facts and circumstances of the case I cannot sustain the order of requisition. I, therefore, commend the respondent Nos. 1 to 3 not to give further effect to the order and also formally to derequisition the disputed premises.

Since the order of requisition is set aside, it is not necessary for me to deal with the order for reconstruction of the bath room. That order becomes ineffective with the setting aside of the order for requisition.

Let a writ of Mandamus accordingly issue.

This rule is made absolute with costs to be paid by respondents Nos. 1, 2 and 3 to the petitioner-hearing fee being assessed at five gold mohurs.

*Rule made absolute with costs.*

## CIVIL RULE

Civil

1963

*Before the Hon'ble Mr. Justice A. N. Roy.*

May, 7.

SULTAN AHMED &amp; ORS.

Vs.

P. DUTT WORKING FOR GAIN AS DEPUTY SECRETARY TO THE  
GOVERNMENT OF WEST BENGAL & ORS.\*

*The West Bengal Premises Requisition and Control (Temporary Provisions) Act, 1947 (West Bengal Act V of 1947), Section 3(1)—Public purpose under—Nature of order under—Section 4—"within a period of 10 days," meaning of—Constitution of India, Article 226—Answer to Rule under—Contents of.*

The conditions of service of the Secretary to the Chief Justice of Calcutta High Court lay down that the Secretary should be within easy call of the Chief Justice. Such condition means that accommodation has to be furnished for him. As such, the requisition of a Suite of rooms for the use of such Secretary under section 3(1) of the West Bengal Premises Requisition and Control (Temporary Provisions) Act, 1947, is for a public purpose.

The orders of requisition under Secretary of the Act are final, but may be struck down by the Court if it can be shown that the order is made for any colourable purpose or for any illegitimate purpose. Where the petitioners are not in residence, it will not be unreasonable to call upon them to deliver possession or to vacate the premises within the time stipulated in the order under Section 4 of the Act, when the person in occupation had no right to remain in the premises.

The words "within a period of 10 days" in Section 4 of the Act mean that the State can call upon the persons in occupation of the premises to vacate at any time within a period of 10 days.

An answer to a Rule issued by the Court under Article 226 of the constitution of India should be complete, and all records on which the deponents rely must form part of the affidavit.

The material facts will appear from the judgment:—

*Amiya Nath Bose with A. M. Pal and D. N. Lahiri—for the Petitioner.*

*J. Majumdar, Additional Government Pleader with P. K. Banerjee—for the Opposite Party.*

The judgment of the Court was as follows:—

**A. N. Roy, J.:**—This Rule is interalia for an order that a Writ in the nature of Certiorari be issued against respondents Nos. 1, 2 and 3 and 4 and direction be given for removal of records and that a writ be issued for quashing the order annexed to the petition and direction be given for withdrawal of the order and that a Writ in the nature of Mandamus be issued directing the opposite parties excepting opposite party No. 5, cancelling the order dated 24th August, 1962 and quashing the same.

The petitioners are Sultan Ahmed, Badra Alam and Dr. Iqbal Ahmed. The order complained of is in the matter of Section 3(1) of the West Bengal Premises Requisition and Control, Act and an order No. 63/62 dated August 24, 1962, in respect of premises No. P/233, Park Street, Calcutta Suite No. 14, Siddique Mansion on the first floor of the said premises. The respondents are P. Dutta working as Deputy Secretary to the Government of the West Bengal, S. Roy working as first Law Acquisition Collector P. E. Baptist, residing at 72 Dr Suresh Sirkar Road and the State of West Bengal through the Secretary Land and Land Revenue Department.

The petitioners are the receivers of premises No. P/233, Park Street, Calcutta. The petitioners filed a suit in the month of March 1957 for ejectment of a tenant A Kalam Quarishi from Suite No. 14 at the premises aforementioned. The decree was passed on June 26, 1959, and appeals were preferred therefrom. On the 23rd February 1962 the Second appeal was dismissed subject to the condition that the decree was not to be executed earlier than May 31, 1962 provided the tenant continued depositing a sum equivalent to the monthly rent, month by month by the 15th day of each succeeding month and in default of such deposit being made, the decree was executable.

One Phani Bhusan Dey filed a suit in May 1962 claiming to be sub-tenant in respect of the said suite No. 14. The proceedings started by Phani Bhusan Dey came to a termination on August 24, 1962.

It is alleged that at 12 noon of August 25, 1962 a Surveyor of the Land Acquisition Collector along with a peon of the department came to the premises and intimated to the Darwan there in the employment of the petitioners that possession would be taken of suite No. 14. It is alleged that the petitioners through their lawyer protested against such forcible occupation. In paragraph 14 of the petition it is alleged that the respondents Nos. 3 and 4 executed the mala fide order. The premises were requisitioned by an order dated August 24, 1962.

The order is impeached on the following grounds. First that the requisition is not for public purpose. Secondly that no proper notice was given under Section 4 of the West Bengal Premises Requisition and Control (Temporary Provisions) Act 1947 being West Bengal Act V of 1947.

As to the first contention it is alleged in the first place that the occupation by a mere employee of the State Government cannot be said to be a public purpose and the State would not suffer in any way without giving such accommodation to the person concerned. It is further alleged that the particular premises in question would not answer the purpose of efficient discharge of public duties on the part of the particular employee. In the second place it is

alleged that the conditions of service of the employee do not require accommodation to be provided to respondent No. 5, and that it is not imperative upon the respondents Nos. 1, 2, 3, 4 and 6 to provide accommodation for the said respondent No. 5.

There is an affidavit in opposition. This affidavit is by way of answering the Rule. The affidavit is affirmed by P. K. Mukherjee. He is the second Land Acquisition Collector, Calcutta. It is stated that the First Land Acquisition Collector Sri S. Roy is on leave on account of illness and therefore, he is unable to affirm the affidavit. The deponent further states that he is affirming that affidavit on behalf of respondents Nos. 1, 2, 3 and 5. In paragraph 3 of the affidavit it is stated that the flat was requisitioned for the purpose of providing residential accommodation to the allottee Sri P. E. Baptist, Secretary to the Hon'ble the Chief Justice, Calcutta High Court. It is also alleged that under the conditions of service the allottee is to reside near the residence of the Hon'ble the Chief Justice and the flat under requisition is near the house of the Chief Justice and in order that the allottee could discharge properly his duties as Personal Assistant to the Hon'ble the Chief Justice the requisition was made. It is also alleged that the respondent No. 4, which obviously is a typing mistake for respondent No. 5, resided at a place which was far away from the residence of the Hon'ble the Chief Justice.

These allegations in the affidavit in opposition are answered by the petitioners in paragraph 6, 7 and 8 of their affidavit affirmed on April 26, 1963. It is alleged there, that premises No. 72, Dr. Suresh Sirkar Road, where the respondent No. 5, resided is about 1.5 mile from the residence of the Hon'ble the Chief Justice and the requisitioned premises is about 1.4 mile from the residence of the Hon'ble the Chief Justice. It is alleged that if public conveyance be used, premises No. 72, Dr. Suresh Sirkar Road, would be better situated, then the requisitioned premises. It is also alleged in the affidavit in reply that though possession was technically taken on August 25, the premises were kept under lock and key till November 1, 1962, and it would appear from that fact that there was no urgent need for possession of the premises for the alleged purpose in the requisition order. The petitioners in their affidavit in reply have disputed that under conditions of service the Secretary to the Hon'ble the Chief Justice has to reside near his residence.

It is necessary at this stage to refer to a few decisions on which counsel for the petitioners relied. Counsel for the petitioner was correct in his criticism of the affidavit in opposition that the conditions of service were not annexed to the affidavit. It is only in the fitness of things that an answer to Rule should be complete and all records on which the deponents reply must form part of the affidavit. Counsel for the State, however, tendered the conditions of service. It will appear from the conditions of service which were drawn up

half a century ago that the Secretary to the Hon'ble the Chief Justice is required to live within easy call of the Chief Justice in a locality where rents are high. Counsel for the petitioner put in the forefront the contention that the conditions of service did not postulate that any residence was to be provided for the Secretary to the Hon'ble the Chief Justice. In other words, his contention was that the condition of service might require that the Secretary should live within easy call of the Hon'ble the Chief Justice but there is no provision that residence has to be procured. Counsel for the petitioner relied on the decisions in *Satya Narayan Nathani, vs. State of West Bengal*(1), *Gobardhan Jayswal vs. The First Land Acquisition Collector and anr.*(2), reported in *Bipin Behari Sadhukhan vs. The First Land Acquisition Collector and others*(3), reported in *Ajit Kumar Prosad vs. State of West Bengal and other*(4). The earliest of these decisions *Satya Narayan Nathani vs. State of West Bengal*(1) is a Bench decision. At page 431 of the report Chief Justice Chakravarti said "an exposition of Public purpose which has received the approval of the Judicial committee is that whatever else public purpose may mean it must include a purpose that has an object and an aim in which the general interest of the community, is directly or vitally concerned. A government servant is undoubtedly a public servant in the broad sense of the term though very remotely a servant of the public, and it may also be said that the public are interested in the proper discharge by a Government servant of the duties of his office. But where the conditions of a Government servant's service do not require that accommodation is to be provided for him or there is nothing to show that there is some special reason for which it is essential to provide him with residential facilities or to find accommodation for him in a particular locality in order that he may be enabled to perform or perform efficiently the duties of his office, I find it difficult to hold that the purpose of providing accommodation to a person merely because he is a Government servant and merely because he is in need of accommodation, is a purpose in which the public, who pay him by a salary for such services as he renders are further interested, not to speak of being interested directly or vitally. "The other decisions have applied this principle to the facts of the respective cases. In the present case, it is indisputable that the Secretary to the Hon'ble the Chief Justice has to be within easy call of the Hon'ble the Chief Justice. The Secretary fulfils the character of a public servant. He is personal Assistant and Secretary to the Hon'ble the Chief Justice. The conditions of service in my opinion sufficiently lay down that the Secretary should be within easy call of the Hon'ble the Chief Justice and the said condition in my opinion, means that accommodation has to be furnished for him. A person cannot be said to be within easy call unless place is pecified or located from where he can be within easy call of the Hon'ble the Chief Justice. As

(1) (1957) 61 C.W.N. 420.  
(3) (1959) 64 C.W.N. 179.

(2) (1957) 62 C.W.N. 159.  
(4) (1962) 66 C.W.N. 463.

such-I am of opinion that the requisition is for a public purpose and it is not for any personal purpose of a Government servant. There is special reason as to why the Secretary has to be provided with residential accommodation in a particular locality. This is all in aid of his efficient performance and discharge of the duties of his office. It is not necessary to refer to the other decisions which have illustrated the principles laid down by Chief Justice Chakravartti.

It was contended in the second place that the order is illegal by reason of infraction of Section 4 of the West Bengal Act V of 1947. It is not disputed that there were two orders under section 3 of the Act. One of the orders was served on the owner and the other was served on the occupier. These orders are tendered. The state will be at liberty to take the originals by keeping loco copies on the usual undertaking to produce the originals, if and when required. It appears from order No. 63/62 dated August 24, 1962 addressed to Sultan Ahmed, Badre Alam and Egbal Ahmed as joint receivers for the premises under requisition that.

The are directed to place the above property at my disposal and control on and from the 26th August 1962 at 1 p.m. or on any subsequent day when an officer deputed from this office will take charge and possession of the property and prepare a schedule of existing fixtures."

A similar notice served on Abdul Kalam Quraishi. It appears that Abdul Kalam Quraishi received the copy on August 25 1962 at flat No. 14. These orders under section 3 are final, but if it can be shown that the order is made for any colourable purpose or for any illegitimate purpose, the court will strike down the orders. In the present case, it is not canvassed that the orders, were made for any illegitimate purpose or for colourable purpose. Under section 4 of the West Bengal Act V of 1947 it is enacted.

"4. (1) Where any premises are requisitioned under this Act the Collector may by notice in writing—(a) order the person in occupation of the premises, if any to vacate the premises within a period of ten days from the service of the notice."

Counsel for the petitioner contended that a period of 10 days minimum notice should be given. Eventually he did not press his contention in that extreme form but he contended that reasonable notice should be given. The words "within a period of 10 days" counsel for the State, in my view, rightly contended, mean that the State could call upon the persons in occupation of the premises to vacate at any time within a period of 10 days. As to what is reasonable time is a question of fact. I am unable to go into disputed facts. It appears from the affidavit evidence that the petitioners were not in occu-

pation of the suite. It may be that they wanted the suite for the personal requirement of one of them. That is not of much importance in the present case. The person in occupation in the present case had no right to remain in occupation after the termination of the proceedings. It would, therefore, not at all be unreasonable to require him to vacate the premises within a period that he was called upon to do so in the present case.

The petitioners were not in residence and therefore, it would not be unreasonable to call upon the petitioners to deliver possession or to vacate the premises within the time stipulated in the order in the present case.

Counsel for the respondent contended that demand for justice was not made on the State but on P. Dutt, one of the respondents. It is true that demand for justice is a matter of substance and not of form. Counsel for the petitioners contended that demand was made of P. Dutt as Secretary and, therefore, demand was made of the Government. That is taking a very lenient liberal and indulgent view of the technical rule in this matter. In the present case I am of opinion that it is not necessary to go into this question of demand for justice in view of the conclusion that I have reached on the two points canvassed before me.

Counsel for the petitioners contended that if he succeeded, there should be an order for derequisition of the premises and delivery of possession. He relied on the decision reported in *Ajit Kumar Prasad vs. State of West Bengal & ors.*(1) where a similar order was made. Counsel for the State on the other hand, contended relying on the decision in *Sohanlal vs. Union of India and another*(2), that a writ of Mandamus would not issue to or an order in the nature of Mandamus is not made against a private individual. In *Sohallal's case*(2) an order was made by the Punjab High Court directing the Union of India and Sohanlal to restore possession of the premises to Jagannath. Against that order the appellant Sohanlal contended that such an order by way of Mandamus could not be made. At page 532 of the report, the Supreme Court said "The eviction of Jagan Nath was in contravention of the express provisions of Section 3 of the Public Premises (Eviction) Act. His eviction therefore, was illegal. He was entitled to be evicted in due course of law and a Writ of Mandamus could issue to or an order in the nature of Mandamus could be made against the Union of India to restore possession of the property to Jagan Nath from which he had been evicted if the property was still in possession of the Union of India. The property in dispute however, is in possession of the appellant . . . . Normally, a writ of mandamus does not issue or an order in the nature of Mandamus is not made against a private individual. Such an order is made against a person directing him to do some particular thing,

(1) (1962) 66 C.W.N. 463.

(2) A.I.R. (1957) S.C. 529.

specified in the order which appertains to his office and is in the nature of a public duty.

In my opinion, Counsel for the State is right in his contention that no order for derequisition or delivery of possession should have been made in the present case in favour of the petitioners, if they had succeeded. I am, therefore, of the opinion that the petitioners are not entitled to any of the reliefs claimed.

The Rule is discharged. There will be no order as to costs.

*Rule discharged nor order as to cost.*

N. C. S.

### SUPREME COURT APPEALS

The Hon'ble Mr. Sudhansu Kumar Das Acting Chief Justice,

The Hon'ble Mr. Justice K. Subba Rao

The Hon'ble Mr. Justice Raghubar Dayal

The Hon'ble Mr. Justice N. Rajagopala Ayyangar

The Hon'ble Mr. Justice J. R. Mudholkar

Civil

GURU GOBINDA BASU Vs.

1963 SHANKARI PRASAD GHOSAL & ORS.\*

August, 14

Constitution of India, Article 102(1) (a)—Disqualification for membership of the House of the People of Parliament—Companies Act, 1956, Section 619—Government Companies—Auditor of holder of an office of profit under the Government of India.

For holding an office of profit under the Government, one need not be in the service of Government and there need be no relationship of master and servant between them.

Looking at the matter from the point of view of substance rather than of form, the appellant is the holder of an office of profit in the two Government Companies, the Durgapur Project Ltd. and the Hindusthan Steel Ltd., for he is appointed, and is remarkable from office, by the Government of India, and performs function for the two Government Companies under the control of the Comptroller and Auditor-General who is himself a holder of an office of profit under the Government of India, and Administrative powers may be controlled by rules made by the President.

Ordinarily there may be five tests of subordination to Government implied by the expression "under the Government" in Article 102(1) (a) of the Constitution, namely, (1) whether Government makes the appointment to the office; (2) whether Government has the right to remove or dismiss the holder of office; (3) whether Government pays the remuneration; (4) what are the functions which the holder of the office performs, and does he perform them for Government; and (5) does Government exercise any control over the performance of those functions.

But the circumstance that the source from which the remuneration is paid, is not from public revenue, is a neutral factor, and is not decisive of the question.

(Special Leave to Appeal No. 555 of 1963).

Whether stress will be laid on one factor or the other will depend on the facts of each case.

Where the several elements, i.e. the power to appoint, the power to discuss, the power to control and give directions as to the manner in which the duties of the office are to be performed, and the power to determine the question of remuneration, are all present in a given case, then, the officer in question holds the office under the authority to empower.

**S. K. Das, Acting Chief Justice :—**This is an appeal on a certificate granted by the High Court of Calcutta under Art. 133(1)(c) of the Constitution. No preliminary objection having been taken as to the competency of the certificate, we have heard the appeal on merits.

The short facts giving rise to the appeal are these. The appellant before us is Gurugobinda Basu who is a chartered accountant and a partner of the firm of auditors carrying on business under the name and style of G. Basu and Company. This firm acted as the auditor of certain companies and corporations, such as the Life Insurance Corporation of India, the Durgapur Projects Ltd. and the Hindustan Steel Ltd., on payment of certain remuneration. The appellant was also a Director of the West Bengal Financial Corporation having been appointed or nominated as such by the State Government of West Bengal. The appointment carried with it the right to receive fees for remuneration as director of the said corporation.

In February-March, 1962, the appellant was elected to the House of the People from Constituency No. 34 (Burdwan Parliamentary Constituency) which is a single member constituency. The election was held in February 1962. There were two candidates, namely, the appellant and respondent No. 3 to this appeal. The appellant was declared elected on March 1, 1962, he having secured 1,55,485 votes as against his rival who secured 1,33,015 votes. This election was thus disqualified him from standing in the election under Art. 102(1)(a) of the Constitution; and (2) that he was guilty of certain corrupt practices which vitiated his election. The second ground was abandoned at the trial, and we are no longer concerned with it.

The Election Tribunal held that the appellant was a holder of offices of profit both under the Government of India and the Government of West Bengal and was therefore disqualified from standing in the election under Art. 102(1)(a) of the Constitution. The Election Tribunal accordingly allowed the election petition and declared the election of the appellant to the House of the People was void. There was an appeal to the High Court made s. 116-A of the Representation of the People Act 1951. The High Court discussed the appeal, but granted a certificate of fitness under Act 133(1)(c) of the Constitution.

The only question before us is whether the appellant was disqualified from being chosen as, and for being, a member of the House of the People under

Art. 102(1)(a) of the Constitution. The answer to the question depends on whether the appellant held any offices of profit under the Government of India or the Government of any State other than such offices as had been declared by Parliament by law not to disqualify their holder. It has not been seriously disputed before us that the office of auditor which the appellant held as partner of the firm of G. Basu and Company was an office of profit. It has not been contended by the appellant before us that the office of profit which he held had been declared by Parliament by law not to disqualify the holder. Therefore, the argument before us have proceeded entirely on the question as to the true scope and meaning of the expression "under the Government of India or the Government of any State" occurring in cl.(a) of Art. 102(1) of the Constitution. The contention on behalf of the appellant has been that on a true construction of the aforesaid expression, the appellant cannot be said to hold an office of profit under the Government of India or the Government of West Bengal. On behalf of the respondents the contention is that the office of auditor which the appellant holds is an office of profit under the Government of India in respect of the Life Insurance Corporation of India, the Durgapur Projects Ltd., and the Hindustan Steel Ltd., and in respect of the West Bengal Financial Corporation of which the appellant is a Director appointed by the Government of West Bengal, he holds an office of profit under the Government of West Bengal. These are the respective contentions which fall for consideration in the present appeal.

It is necessary to state here that if in respect of any of the four companies or corporations it be held that the appellant holds an office of profit under the Government be it under the Government of India or the Government of West Bengal, then the appeal must be dismissed. It would be unnecessary then to consider whether the office of profit which the appellant holds in respect of the other companies is an office of profit under the Government or not. We would therefore take up first the two companies, namely, the Durgapur Projects Ltd., and the Hindustan Steel Ltd., which are 100 per cent Government companies and consider the respective contentions of the parties before us in respect of the office of auditor which the appellant holds in these two companies. If we hold that in respect of any of these two companies the appellant holds an office of profit under the Government of India, then it would be unnecessary to consider the position of the appellant in any of the other companies.

It is not disputed that the Hindustan Steel Ltd., and the Durgapur Projects Ltd. are Government companies within the meaning of s. 2(18) read with s. 617 of the Indian Companies Act, 1956. It has been stated before us that 100 per cent of the shares of the Durgapur Projects Ltd. are held by the Government of West Bengal and 100 per cent of the shares of the Hindustan Steel Ltd. are held by the Union Government. We may now read s. 619 of the Indian Companies Act, 1956:

"(1) In the case of a Government company, the following provisions shall apply, notwithstanding anything contained in section 224 to 233.

(2) The auditor of a Government company shall be appointed or re-appointed by the Central Government on the advice of the Comptroller and Auditor-General of India.

(3) The Comptroller and Auditor-General of India shall have power—

(a) to direct the manner in which the company's accounts shall be audited by the auditor appointed in pursuance of sub-section (2) and to give such auditor instructions in regard to any matters relating to the performance of his functions as such;

(b) to conduct a supplementary or test audit of the company's accounts by such person or persons as he may authorise in this behalf; and for the purpose of such audit, to require information or additional information to be furnished to any person or persons so authorised, on such matters, by such person or persons, and in such form, as the Comptroller and Auditor-General may, by general or special order, direct.

(4) The auditor aforesaid shall submit a copy of his audit report to the Comptroller and Auditor-General of India who shall have the right to comment upon, or supplement, the audit report in such manner as he may think fit.

(5) Any such comments upon, or supplement for the audit report shall be placed before the annual general meeting of the company at the same time and in the same manner as the audit report."

It is clear from the aforesaid provisions that notwithstanding s. 224 of the Act which empowers every company to appoint an auditor or auditors at each annual general meeting, the appointment of an auditor of a Government company rests solely with the Central Government and in making such appointment the Central Government takes the advice of the Comptroller and Auditor-General of India. Under s. 224(7) of the Act an auditor appointed under s. 224 may be removed from office before the expiry of his term only by the company in general meeting, after obtaining the previous approval of the Central Government in that behalf. The remuneration of the auditors of a company is to be fixed in accordance with the provisions of sub-section (8) of s. 224. It is clear however that sub-section (7) of s. 224 does not apply to a Government company because the auditor of a Government company is not

appointed under s. 224 of the Act, but is appointed under sub-section (2) of s. 619 of the Act. It is clear therefore that the appointment of an auditor in Government company rests solely with the Central Government and so also his removal from office. Under sub-section (3) of s. 619 the Comptroller and Auditor-General of India exercises control over the auditor of a Government company in respect of various matters including the manner in which the company's accounts shall be audited. The Auditor-General has also the right to give such auditor instructions in regard to any matter relating to the performance of his functions as such. The Auditor-General may conduct a supplementary or test audit of the company's accounts by such person or persons as he may authorise in this behalf. In other words, the Comptroller and Auditor-General of India exercises full control over the auditors of a Government company. The powers and duties of auditors in respect of companies other than Government companies are laid down in s. 227 of the Act but by virtue of sub-section (1) of s. 619 of the Act, the provisions in s. 227 of the Act do not apply to a Government company because a Government company is subject to the provisions of s. 619 of the Act. Under s. 619-A of the Act, where the Central Government is a member of a Government company, an annual report of the working and affairs of the company has to be prepared and laid before both Houses of Parliament with a copy of the audit report and the comments made by the Comptroller and Auditor-General. Under s. 620 of the Act the Central Government may, by notification direct that any of the provisions of the Act, other than ss. 618, 619 and 639, shall not apply to any Government company.

The net result of the aforesaid provisions is that so far as the Durgapur Projects Ltd., and the Hindustan Steel Ltd. are concerned, the appellant was appointed an auditor by the Central Government; he is removable by the Central Government and the Comptroller and Auditor-General of India exercises full control over him. His remuneration is fixed by the Central Government under sub-section (8) of s. 224 of the Act though it is paid by the company.

In these circumstances the question is, does the appellant hold an office of profit under the Central Government? We may now read Art. 102(1) of the Constitution:

"102(1) A person shall be disqualified for being chosen as and for being, a member of either House of Parliament—

- (a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder

|     |   |   |   |   |   |   |
|-----|---|---|---|---|---|---|
| (b) | x | x | x | x | x | x |
| (c) | x | x | x | x | x | x |
| (d) | x | x | x | x | x | x |
| (e) | x | x | x | x | x | x |

We have stated earlier that the sole question before us is whether the office of profit which the appellant undoubtedly holds as auditor of the Durgapur Projects Ltd., and the Hindustan Steel Ltd. is or is not under the Government of India. According to Mr. Chaudhuri who has argued the appeal on behalf of the appellant, the expression "under the Government" occurring in Art. 102(1)(a) implies subordination to Government. His argument is that ordinarily there are five tests of such subordination, namely, (1) whether Government makes the appointment to the office; (2) whether Government has the right to remove or dismiss the holder of office; (3) whether Government pays the remuneration; (4) what are the functions which the holder of the office performs and does he perform them for Government; and (5) does Government exercise any control over the performance of those functions. His argument further is that tests must all co-exist and each must show subordination to Government so that the fulfilment of only some of the tests is not enough to bring the holder of the office under the Government. According to him all the tests must be fulfilled before it can be said that the holder of the office is under the Government. His contention is that the Election Tribunal and the High Court were in error in holding that the appellant was a holder of office under the Government, because they misconstrued the scope and effect of the expression "under the Government" in Art. 102(1)(a) of the Constitution. He has contended that tests (3), (4) and (5) adverted to above are not fulfilled in the present case. The appellant gets his remuneration from the company though fixed by Government; he performs functions for the company and he is controlled by the Comptroller and Auditor-General who is different from the Government.

On behalf of the respondents it is argued that the tests are not cumulative in the sense contended for by the appellant, and what has to be considered is the substance of the matter which must be determined by a consideration of all the factors present in a case, and whether stress will be laid on one factor or the other will depend on the circumstances of each particular case. According to the respondents, the tests of appointment and dismissal are important tests in the present case, and in the matter of a company which is a 100 per cent Government company, the payment of remuneration fixed by Govern-

ment, the performance of the function for the company and the exercise of control by the Comptroller and Auditor-General, looked at from the point of view of substance and taken in conjunction with the power of appointment and dismissal, really bring the holder of the office under the Government which appoints him.

One point may be cleared up at this stage. On behalf of the respondents no question has been raised that the Durgapur Projects, Limited or the Hindustan Steel, Limited is a department of Government or an emanation of Government—a question which was considered at some length in *Narayanan swamy v. Krishnamurthi*(1). Learned counsel for the respondents has been content to argue before us on the basis that the two companies having been incorporated under the Indian Companies Act, 1956, are separate legal entities distinct from Government. Even on that footing he has contended that in view of the provisions of s. 619 and other provisions of the Indian Companies Act, 1956, an auditor appointed by the Central Government and liable to be removed from office by the same Government, is a holder of an office of profit under the Government in respect of a company which is really a hundred per cent Government company

We think that this contention is correct. We agree with the High Court that for holding an office of profit under the Government, one need not be in the service of Government and there need be no relationship of master and servant between them. The Constitution itself makes a distinction between 'the holder of an office of profit under the Government' and 'the holder of a post or service under the Government'; see Arts. 309 and 314. The Constitution has also made a distinction between 'the holder of an office of profit under the Government' and 'the holder of an office of profit under a local or other authority subject to the control of Government'; see Arts. 58(2) and 66(4). In *Maulana Abdul Shakur v. Rikhab Chand and another*(2) the appellant was the manager of a school run by a committee of management formed under the provisions of the Durgah Khwaja Saheb Act, 1955. He was appointed by the administrator of the Durgah and was paid Rs. 100 per month. The question arose whether he was disqualified to be chosen as a member of Parliament in view of Art. 102(1)(a) of the Constitution. It was contended for the respondent in that case that under ss. 5 and 9 of the Durgah Khwaja Saheb Act, 1955, the Government of India had the power of appointment and removal of members of the committee of management as also the power to appoint the administrator in consultation with the committee; therefore the appellant was under the control and supervision of the Government and that therefore he was holding an office of profit under the Government of India. This contention was repelled and this court pointed out the distinction between

(1) I.L.R. (1958) Madras 513.

(2) (1958) S.C.R. 387.

'the holder of an office of profit under the Government' and 'the holder of an office of profit under some other authority subject to the Control of Government.' Mr. Chaudhuri has contended before us that the decision is in his favour. He has argued that the appellant in the present case holds an office of profit under the Durgapur Projects Ltd. and the Hindustan Steel Ltd. which are incorporated under the Indian Companies Act; the fact that the Comptroller and Auditor-General or even the Government of India exercises some control does not make the appellant any the less a holder of office under the two companies. We do not think that this line of argument is correct. It has to be noted that in *Maulana Abdul Shakur's case*, (supra)(1) the appointment of the appellant of that case was not made by the Government nor was he liable to be dismissed by the Government. The appointment was made by the administrator of a committee and he was liable to be dismissed by the same body. In these circumstances this court observed:

"No doubt the Committee of the Durgah Endowment is to be appointed by the Government of India but it is a body corporate with perpetual succession acting within the four corners of the Act. Merely because the Committee or the member's of the Committee are removable by the Government of India or the Committee can make bye-laws prescribing the duties and powers of its employees cannot in our opinion convert the servants India. The appellant is neither appointed by the Government of India, nor is removable by the Government of India nor is he paid out of the revenues of India. The power of the Government to appoint a person to revenues of India. The power of the Government to appoint a person to an office of profit or to continue him in that office or revoke his appointment at their discretion and payment from out of Government revenues are important factors in determining whether that person is holding an office of profit under the Government though payment from a source other than Government revenue is not always a decisive factor. But the appointment of the appellant does not come within this test."

It is clear from the aforesaid observations that in *Maulana Abdul Shakur's case*(1) the factors which were held to be decisive were (a) the power of the Government to appoint a person to an office of profit or to continue him in that office or revoke his appointment at their discretion, and (b) payment from out of Government revenues, though it was pointed out that payment from a source other than Government revenues was not always a decisive factor. In the case before us the appointment of the appellant as also his continuance in office rests solely with the Government of India in respect of the two companies. His remuneration is also fixed by Government. We assume for the purpose of this appeal that the two companies are statutory bodies distinct from Government but we must remember at the same time that they are

(1) (1958) S.C.R. 387.

Government companies within the meaning of the Indian Companies Act, 1956, and 100 per cent of the shares are held by the Government. We must also remember that in the performance of his functions the appellant is controlled by the Comptroller and Auditor-General who himself is undoubtedly holder of an office of profit under the Government, though there are safeguards in the Constitution as to his tenure of office and removability therefrom. Under Art. 148 of the Constitution the Comptroller and Auditor-General of India is appointed by the President and he can be removed from office in like manner and on the like grounds as a Judge of the Supreme Court. The salary and other conditions of service of the Comptroller and Auditor-General shall be such as may be determined by Parliament by law and until they are so determined shall be as specified in the Second Schedule to the Constitution. Under cl. (4) of Art. 148 the Comptroller and Auditor-General is not eligible for further office either under the Government of India or under the Government of any State after he has ceased to hold his office. Cl. (5) of the said Article lays down that subject to the provisions of the Constitution and of any law made by Parliament, the administrative powers of the Comptroller and Auditor-General shall be such as may be prescribed by rules made by the President after consultation with the Comptroller and Auditor-General. Under Art. 149 of the Constitution the Comptroller and Auditor-General shall perform such duties and exercise such power in relation to the accounts of the Union and of the State and of any other authority or body as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States as were conferred on or exercisable by the Auditor-General of India immediately before the commencement of the Constitution in relation to the accounts of the Dominion of India and of the Provinces respectively. The reports of the Comptroller and Auditor-General of India relating to the accounts of the Union have to be submitted to the President and the reports of the Comptroller and Auditor-General relating to the accounts of a State have to be submitted to the Governor. From the aforesaid provisions it appears to us that the Comptroller and Auditor-General is himself a holder of an office of profit under the Government of India, being appointed by the President and his administrative powers are such as may be prescribed by rules made by the President, subject to the provisions of the Constitution and of any law made by Parliament. Therefore if we look at the matter from the point of view of substance rather than of form, it appears to us that the appellant as the holder of an office of profit in the two Government companies, the Durgapur Projects Ltd. and the Hindustan Steel Ltd., is really under the Government of India; he is appointed by the Government of India, he is removable from office by the Government of India; he performs functions for two Government companies under the control of the Comptroller and Auditor-General who himself is appointed by the President and whose administrative powers may be controlled by rules made by the President.

In *Ramappa vs. Sengappa*(1) the question arose as to whether the holder of a village office who has a hereditary right to it is disqualified under Art. 191 of the Constitution, which is the counter-part of Art. 102, in the matter of membership of the State Legislature. It was observed therein:

“The Government makes the appointment to the office though it may be that it has under the statute no option but to appoint the heir to the office if he has fulfilled the statutory requirements. The office is, therefore, held by reason of the appointment by the Government and not simply because of a hereditary right to it. The fact that the Government cannot refuse to make the appointment does not alter the situation.”

There again the decisive test was held to be the test of appointment. In view of these decisions we cannot accede to the submission of Mr. Chaudhuri that the several factors which enter into the determination of this question—the appointing authority, the authority vested with power to terminate the appointment the authority which determines the remuneration, the source from which the remuneration is paid, and the authority vested with power to control the manner in which the duties of the office are discharged and to give directions in that behalf—must all co-exist and each must show subordination to Government and that it must necessarily follow that if one of the elements is absent, the test of a person holding an office under the Government, Central or State, is not satisfied. The cases we have referred to specifically point out that the circumstance that the source from which the remuneration is paid is not from public revenue is a neutral factor—not decisive of the question. As we have said earlier whether stress will be laid on one factor or the other will depend on the facts of each case. However, we have no hesitation in saying that where the several elements, the power to appoint, the power to dismiss, the power to control and give directions as to the manner in which the duties of the office are to be performed, and the power to determine the question of remuneration are all present in a given case, then the officer in question holds the office under the authority so empowered.

For the reasons given above we have come to the conclusion that the Election Tribunal and the High Court were right in coming to the conclusion that the appellant as an auditor of the two Government companies held an office of profit under the Government of India, within the meaning of Art. 102(1)(a) of the Constitution. As such he was disqualified for being chosen as, and for being, a member of either House of Parliament. It is unnecessary, to consider the further question whether he was a holder of an office of profit either under the Government of India or the Government of West Bengal by reason of being an auditor for the Life Insurance Corporation of India or a Director of the West Bengal Financial Corporation.

The appeal accordingly fails and is dismissed with costs.

*Appeal dismissed with costs.*

N. C. S.

## CIVIL RULE.

*Before the Hon'ble Mr. Justice P. B. Mukharji.*

Civil.

1958

April, 1.

ANADI MEHTA

Vs.

THE ELECTION TRIBUNAL &amp; ORS.\*

*Representation of the People Act, 1951 (Central Act XLIII of 1951), as amended section 90(5)—Construction of—Order refusing amendment of election petition under Certiorari when may issue—"Particulars of any corrupt practice" in Section 90(5), meaning of—object of the Act—Interlocutory orders of Election Tribunal, interference with, if permissible.*

Every question of Construction of a Statute does not necessarily involve a point of jurisdiction.

An error in the decision or determination itself can only be amenable to a writ of certiorari when it is a manifest error apparent on the face of the proceedings and which can be said to be based on clear ignorance or disregard of the provisions of law.

Where the question is one of delectable construction of sections of an Act or a Statute. This cannot always be said to be a manifest error, where there is possibility of reasonably coming to two different views on the construction of the statutory provisions, the doctrine of error manifest on the face of the proceedings cannot be applied. In that event, the only way to attract the certiorari jurisdiction under Article 220 of the constitution will be if the particular question of construction involves a point of jurisdiction.

The power of the Election Tribunal under Section 90(5) of the Representation of the People Act, 1951, as amended, to allow amendment to the election petition is expressly made discretionary by the use of the word "may". In the field of discretion, the Court will be loath to interfere by a writ of certiorari when that discretion cannot be said to be whimsical or in any obvious disregard of any law. The fact that the High Court might have come to a different view of the construction of the Statute is not a ground for interfering by a writ of certiorari where the Tribunal's refusal to allow amendment has proceeded on a reasoned construction of sections of the statute.

"The particulars of any corrupt practice" mentioned in section 90(5) of the Act have obvious references to those particulars already required to be placed in an election petition under section 83(b) of the Act. Therefore, vague assertion of a general head of charge, such as bribery, which does not contain any intimation about those new and fresh instances of bribery which the petitioner tries to introduce by way of amendment into the petition, cannot be permitted. They are not particulars of any corrupt practice already alleged in the petition. What can be amended or amplified are only the particulars, and not introduction of new instances of corrupt practices, under the new amended section of the statute.

The decisions of the Tribunal under sections 98 and 99 are orders at the conclusion of the trial of an election petition either discussing the election petition, or declaring the election of all or any of the return candidates to be void and the petitioner or any other candidate to have been duly elected. It is not the policy of the Act, having regard to these express provisions, to permit easy interference with interlocutory orders of Election Tribunals. That will frustrate speedy disposal of election petitions, which is the avowed object of this Act.

The material facts will appear from the Judgment:—

Nirmal Chandra Sen with Sunil Mukherjee—for the Petitioner.

Bankim Chandra Dutt with Bhabani Sankar Bagchi for O. P. No. 2—  
for the Opposite Parties.

\* Civil Rule No. 2620 of 1957.

The judgment of the Court was as follows:—

**P. B. Mukharji, J.**—The petitioner filed an election petition under the Representation of People Act, 1951, alleging bribery as a corrupt practice. Only three instances of bribery were given in the petition. The petition was filed on the 3rd May 1957, and was gazetted on the 14th June, 1957. The application for amendment to introduce five new instances of bribery was not made until the 13th August, 1957. This application to introduce five new instances of bribery by way of an amendment to the election petition was heard by the Election Tribunal on the 2nd September 1957, and rejected on the 5th September 1957.

The petitioner filed this application against that order of rejection and obtained a Rule from this court under Article 226 of the Constitution on the 10th September 1957. This application in my opinion must fail both on the ground of jurisdiction as well as on the merits.

It has been laid down by the Supreme Court of India that under Article 226 of the Constitution in respect of certiorari, this court does not act as a court of appeal or a court of review. The first question here is whether an order rejecting an application for amendment can by any proposition of law or fact be regarded as one raising a question of jurisdiction and whether a decision either allowing an amendment or refusing an amendment could be regarded as one raising a question of failure of jurisdiction by an inferior court or tribunal so as to attract the supervisory jurisdiction of this High Court under Article 226 of the Constitution. The Election Tribunal has refused to allow the petitioner to amend the petition so as to introduce five new and fresh instances of bribery which were not at all in the original petition. At best, the refusal by the Election Tribunal could only be regarded as an erroneous decision in law. The Supreme Court of India has laid down in the case of *Hari Vishnu vs. Syed Ahmed Ishaque*(1), *T. C. Basappa vs. T. nagappa*(2), and *Prem Singh and others vs. Deputy Custodian General Evacuee Property and others*(3), that a mere wrong decision in law does not attract the powers of certiorari of this court under Article 226 of the Constitution. A glance at the judgment of the Election Tribunal on this point shows that the Tribunal went into great details on the question of construction and came to the conclusion that it could not allow the petition for amendment. The point at best in this case is a question of construction of section 90(5) of the amended Representation of People Act, 1951. Every question of construction does not necessarily involve a point of jurisdiction. An error in the decision or determination itself can only be amendable to a writ of certiorari when it is a manifest error apparent on the face of the proceedings and which can be said to be based on clear ignorance or disregard of the provisions of law. Where the question is one of debatable construction of sec-

(1) (1955) 91 S.C.R. 1104.

(2) (1955) S.C.R. 250.

(3) (1958) S.C.A. 24.

tions of an Act or a statute, this cannot always be said to be a manifest error. Where there is possibility of reasonably coming to two different views on the construction of the statutory provisions, the doctrine of error manifest on the face of proceedings cannot be applied. In that event the only way to attract the certiorari jurisdiction under Article 226 of the Constitution will be if the particular question of construction involves a point of jurisdiction. Therefore, on the principles laid down by the Supreme Court, I hold that under Article 226 of the Constitution this court will not interfere by a writ of certiorari with the decision of the Election Tribunal refusing the petitioner's application for amendment of the election petition by introducing five unconnected, entirely new and fresh instances of bribery which were originally not pleaded at all, in the petition.

Secondly, this power of the Tribunal to allow amendments to petition is expressly made discretionary by the statute. Under section 90(5) of the Representation of the People Act, 1951(1), as amended, the language is "The Tribunal may \*\*\* allow the particulars". The use of the word 'may' shows that it is discretionary with the Tribunal to allow or refuse particulars. In the field of discretion this court will be loath to interfere by a writ of certiorari when that discretion cannot be said to be whimsical or in any obvious disregard of any law. In this case Tribunal's refusal has proceeded on a reasoned construction of sections of the statute. The fact that this court might have come to a different view of the construction of the statute, although in this case I find myself entirely in agreement with the view of the construction taken by the Tribunal, is not a ground for interfering by a writ of certiorari under Article 226 of the Constitution in the field or discretion of the inferior court. I, therefore, hold that even on this ground that it is a discretionary field, the application should fail.

Coming to the merits of this application the main controversy turns on the question of construction of section 90(5) of the Representation of the People (Second Amendment) Act, 1956 (Act No. XXVII of 1956), published on the 8th June 1956. The substance of the petitioner's point on this ground is that it is enough in an election petition to allege the grounds, only, and the particulars of such grounds could be added latter on. For this purpose Mr. Sen appearing for the petitioner has relied upon the decision of the Supreme Court in the case of *Harish Chandra Bajpai and another vs. Triloki Singh & another*(1). That decision is an authority on the Representation of the People Act before the amendment of the statute although it was rendered after the amended statute came into operation. The decision is based on section 83(3) of the Representation of the People Act prior to the amendment. The Supreme Court came to the decision in that case that the Tribunal had power to allow particulars in respect of illegal or corrupt practices to be amended provided the petition itself specified the grounds or charges and

this power extended to permitting new instances to be subsequently added. Venkatarama Ayyar, J., in delivering the judgment of the Supreme Court in that case proceeded on the triple distinction made by the Representation of the People Act between 'grounds' in section 81(1), 'facts' in section 83(1) and fell 'particulars' in section 83(2) of the Act. This will be clear from the observations of the learned Judge at page 624 of that report. The learned Judge (Ayyar, J.) succinctly put the contention at page 624:—

"And in this context, facts in section 83(1) must mean instances of the charge on which the petition is grounded and the particulars referred to in section 83(3) can only mean particulars in respect of the instances set out in the petition in accordance with section 83(1). The consequence is that an instance of a corrupt practice not given in the petition cannot be brought in under section 83(3)."

Ayyar, J. proceeded to give his determination on this point in the following terms at the same page of the Report:—

"We are unable to agree with this contention. In our opinion, section 81(1) and section 83, sub-sections (1) and (2), when correctly understood, support the contention of the respondent that the Tribunal has authority to allow amendment even when that involves inclusion of new instances, provided they relate to a charge contained in the petition."

The difficulty with the petitioner is that the amended section 90(5) of the Representation of the People Act, 1951, apparently seems to indicate that the law has been changed by statute and it is not longer the same as that laid down by the Supreme Court decision in the Bajpai's case.

Section 90(5) of the Representation of the People Act, 1951, as amended, reads as follows:—

"The Tribunal may, upon such terms as to costs and otherwise as it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition."

If this Act with the section as amended is clear by itself, it is necessary to make any comparison with the older provisions which have been replaced by the new one. On the language of the amended section as I have quoted

above it seems to me to be plain that the power of the Tribunal to allow particulars must now relate to the particulars already alleged. The language is 'allow particulars of any corrupt practice alleged in the petition to be amended or amplified.' What is to be amended or amplified are the particulars of the corrupt practice. It is true that the corrupt practice must be alleged in the petition. It is true that in this case bribery as a corrupt practice was alleged in the petition. But the particulars of bribery which were there in the petition could not by amendment or amplification be made to include new instances of bribery.

Under section 123 of the Representation of the People Act, corrupt practice includes seven different varieties or classes, e.g. (1) bribery, (2) undue influence, (3) solicitation for vote and appeal to refrain from voting on grounds of caste, race community or religion, etc., (4) false publication, (5) the hiring or procuring of vehicles or vessels, (6) the incurring or authorising of expenditure in contravention of section 7 of the Act and (7) obtaining assistance from any person in the service of the Government. The contention on behalf of the petitioner is that if one particular class of corrupt practice such as bribery is pleaded in the petition, new and fresh instances of bribery can always be brought in by way of amendments.

I am afraid this is no longer permissible after the amendment of the statute. What can be 'amended or amplified' are the particulars. There must, therefore, be some particulars of the corrupt practice alleged in the petition. New instances of corrupt practice would not come under the meaning of the expression 'particulars of any corrupt practice.' Vague allegation of corrupt practice without instance is hardly a worthwhile averment. In fact, section 83 of the Act, as amended, provides what an election petition should contain. Among others it provides that "an election petition shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice". "The particulars of any corrupt practice" mentioned in section 90(5) of the Act have obvious reference to those particulars already required to be placed in an election petition under section 83(b) of the statute. Therefore, vague assertion of a general head of charge such as bribery which does not contain any intimation about these new and fresh instances of bribery which the petitioner in this case now tries to introduce by way of amendment into the petition cannot be permitted. They are not particulars of any corrupt practice already alleged in the petition. What can be amended or amplified are only the particulars and not introduction of new instances of corrupt practice under the new amended section of the statute.

This is what makes the difference between this amendment and the previous decision of the Supreme Court in Bajpai's case. To concede to the petitioner's contention would mean that I should hold the expression "the particulars of" in section 90(5) of the Act to be entirely redundant because without the words 'the particulars of' the section would allow any corrupt practice alleged in the petition to be amended or amplified. This is exactly what the petitioner wants to do to amend or amplify the corrupt practice by introducing new instances. But that is what I understand the amendment of the statute prevents by saying that it is only the particulars of a corrupt practice already alleged in the petition which can be amended or amplified. The words 'to be amended or amplified' qualify in my opinion the word 'particulars' and not the words 'corrupt practice' in section 90(5) of the Act.

Pursuing this question of construction it also appears to me that the concluding portion of this sub-section makes the proposition clearer. It definitely says that the Tribunal shall not allow any amendment of the petition which would have the effect of introducing particulars of a corrupt practice not previously alleged in the petition. Now, the particulars of a corrupt practice such those as are now intended to be introduced by the amendment were never alleged or even ascertained or hinted at in the election petition. They are entirely new instances altogether. If this concluding portion of section 90(5) of the Act was intended only to mean that no amendment should be allowed to introduce a new corrupt practice which has not been alleged in the petition then that need not have been said for that would have come under the general provisions of section 90(1) of the Act which makes Civil Procedure Code applicable to the trial of an election petition as far as possible and the ordinary rules of amendment of the Civil Procedure Code which prohibit introducing a new cause of action would have prohibited similarly introduction of a new corrupt practice.

I am, therefore, satisfied that this application must also fail on the merits.

I should like to add only one observation before I conclude. The trial of election petition should be held and conducted as expeditiously as possible. That is the express aspiration in section 90(6) of the Representation of the People Act. The Statute also provides appeals against orders of Election Tribunal under section 1116A of the Act. The statute provides only for appeals against decision of the Tribunal under sections 96 and 99 of the Act to the High Court of the State and the decision of the High Court on such appeals and subject only to such decision the order of the Tribunal under section 96 or section 99 is made final and conclusive. The decisions of the Tribunal under section 98 and 99 are orders at the conclusion of the trial of an election

petition either dismissing the election petition or declaring the election of all or any of the returned candidates to be void, and the petitioner or any other candidate to have been duly elected. It is not the policy of the Act having regard to these express provisions to permit easy interference with interlocutory orders of Election Tribunals. That will frustrate speedy disposal of election petitions which is the avowed object of this Act.

For these reasons I dismiss the petition and discharge the Rule.

There will be no order as to costs.

The interim stay order is vacated.

N. C. S.

*Rule discharge, no order as to costs  
the interim order is vacated.*

### APPEAL FROM ORIGINAL CIVIL

*Before the Hon'ble Mr. Justice R. S. Bachawat and  
the Hon'ble Mr. Justice C. N. Laik.*

Civil

1962

July, 31

HARIDAS MUNDRA

Vs.

NATIONAL AND GRINDLAYS BANK LTD.

*Indian Contract Act, 1872, Section 176—Construction of Powers of the Pawnee under.*

In construing Section 176 of The Indian Contract Act, 1872, too much importance should not be given to the semicolon in the first paragraph of that section.

In a case where the pawnor makes default, the pawnee has three rights: (i) he may bring a suit against the pawnor upon the debt or promise, and (ii) he may retain the pawn as a collateral security, or (iii) he may sell it on giving the pawnor reasonable notice of the sale. The right to retain the pawn and the right to sell it are alternative and not concurrent rights. The pawnee has the right to sue on the debt or the promise concurrently with his right to retain the pawn or to sell it.

Even if it be assumed that the right of sale out of Court is alternative to the right to institute a suit on the debt or promise, the two alternatives are not necessarily mutually exclusive, and the exercise of one alternative right does not destroy all further recourse to the other alternative.

When the word "or" is used in relation to two or more alternatives, it is not necessarily the case that the alternatives are mutually exclusive. The question as to whether they are mutually exclusive or not must be determined by applying the general rule that the words should be construed to ascertain the intention of the provision in question to be collected from the whole of its terms.

The word, "Sale" in Section 176 of the Act means intended sale as opposed to the expression "actual sale" in Section 177 of the Act. Section 176 requires notice of the intended sale, where the notice gave a reasonable time to the pawnor to pay the debt and reduce the pawn, and definitely and clearly stated that in default of payment within the time mentioned the pawnee would sell the pawn, such notice would be a valid notice under Section 176.

Under the Indian law, the pawnee is not bound to sell the pawn by public auction. He may sell it by private treaty after giving reasonable notice of sale under Section 176. Such a notice may be sufficiently given without specifying the place, date and time of the sale. Section 176 does not require that the notice of sale must in all cases give such particulars. The reasonableness of a notice varies from case to case. The special circumstances of some particular case may require that a reasonably notice of the sale should give such particulars but the onus is upon the pawnor to establish that such special circumstances exist.

Where the Plaintiff alleges mala fide against the Defendant, it is for the Plaintiff to establish it by evidence.

Where the debit is not fully secured, and the pawnor is unable to deposit in Court the entire amount of debit, the discretion of the Court cannot be exercised in favour of the pawnor by grant of an order of injunction restraining the pawnee from selling the pawn.

Whose pecuniary compensation is also adequate relief in the suit, the Court should be reluctant to grant injunction in favour of the plaintiff.

Where the plaintiff in a subsequent suit takes up a position contradictory to that taken by him in an earlier suit in respect of the same matter, such conduct of his alone should disentitle him from getting relief by way of injunction.

The material facts will appear from the Judgment:—

R. C. Deb with S. Mukherjee—for the Appellant.

Advocate General with Suborata Roy Chowdhury—for the Respondent.

The Judgment of the Court was as follows:—

**Bachawat, J.:**—This is an appeal by the plaintiff from a decree dismissing his suit, claiming a perpetual injunction restraining the defendant banking company from selling the shares pledged by him with the defendant. The plaintiff had a current overdraft account with the defendant. To secure the overdraft, the plaintiff pledged divers shares with the defendant. The plaintiff executed a letter of lien dated April 27, 1955, empowering the defendant to sell and dispose of the shares on default of payment of the moneys due on demand. On July 1st 1959, the plaintiff was indebted to the defendant for the sum of Rs. 36,46,627-82 nP. On July 1st 1959 the defendant instituted Suit No. 858 of 1959 against the plaintiff for the recovery of its dues and obtained leave under order 2 Rule 2 of the Code of Civil Procedure, 1908 to take appropriate proceedings in respect of the shares. We are informed that this suit has now been decreed in full. During the pendency of this suit, on February 6, 1960 the defendant served a notice on the plaintiff demanding payment of its dues and stating in default of payment on or before February 18, 1960 the pledged shares or such of them as the defendant might decide to sell would be sold by the defendant in exercise of its rights and powers as the pledge and the nett proceeds would be applied in reduction of the plaintiff's indebtedness." On June 27, 1960, the plaintiff wrote to the defendant stating inter alia that in view of the pending of the suit instituted by the defendant, the defendant had no right to sell or dispose of any of the shares. On June

29, 1960 the plaintiff instituted this suit claiming perpetual injunction restraining the defendant from selling the shares on the ground that in view of the institution of Suit No. 858 of 1959, the defendant had no longer any right to sell the shares. By a subsequent amendment made on September 7, 1961. The plaintiff alleged that the notice dated February 6, 1960, was not a reasonable notice of the sale and/or was in contravention of section 176 of the Indian Contract Act. There was also a prayer in the plaint asking for a decree directing the defendant to accept the bullion offered by the plaintiff in exchange of the shares. The prayer is no longer pressed. The plaintiff now presses his claim for perpetual injunction in terms of prayer (a) of the plaint only. The learned trial Judge has dismissed the suit.

Mr. R. C. Deb appearing on behalf of the plaintiff contends that upon the institution of Suit No. 858 of 1959 the defendant has lost the right to sell the shares in exercise of its rights as a pawnee under Section 176 of the Indian Contract Act. The argument is that the right of the pawnee to sue upon the debt or in the promise is alternative to his right to sell the pawn and that he cannot sell the pawn after he elects to sue on the debt or the promise.

In support of this argument Mr. Deb relied upon the dicta in *Nim Chand vs. Jagabandhu Ghose*(1), in *Mahalinga Nadar vs. Ganapathi Subbien*(2) and *Co-operative Hindusthan Bank Ltd. vs. Surendra Nath Dey*(3), to the effect that under Section 176 of the Contract Act, the Pawnee is entitled either to bring a suit against the pawner upon the debt or promise retaining the pawn as collateral security or he may sell it upon giving reasonable notice of the sale and that the section gives him the right to sell only as an alternative to the right to have his remedy by suit. On the other side reliance was placed on the dicta in *Saiyad Ali Khan vs. Debi Prosad*(4) and *Lala Jyoti Prakash Nandi vs. Lala Mukti Prakash Nandi*(5), to the effect that the section gives the Pawnee the right to bring a suit on the debt retaining the Pawn as collateral security and also empowers him to sell it after giving reasonable notice and to recover the balance of the debt, if any, remaining after such sale and that the two rights are concurrent rights. In this connection reference was also made to the dicta, to the effect that in a case where both the right to sue for the sale or the pledged property and the right to sue for a personal decree exist, they are concurrent rights. It is to be observed that in none of these cases the Courts were called upon to decide the question whether the right to sell the pawn is alternative to the right to sue on the debt and whether upon the institution of a suit upon the debt the pawnee loses his right to sell the

(1) (1894) I.L.R. 22 Calcutta 21-24.

(2) (1902) I.L.R. 27 Madras 528-531.

(3) (1931) I.L.R. 59 Calcutta 667 at 685. A.I.R. (1932) Calcutta 524-532.

(4) (1911) I.L.R. 24 Allahabad 251-523.

(5) (1915) 22 C.W.N. 297-301; A.I.R. (1918) Calcutta 947-949.

pawn on giving reasonable notice. We think that we are free to decide the point in issue on a consideration of the relevant sections of the Indian Contract Act.

Now, a pledge is a bailment of goods as security for payment of debt or performance of a promise, see Section 172 of the Indian Contract Act. The pawnee has the right to retain the Pawn as security and the scope and ambit of this right of retainer is defined by sections 173 and 174. Section 176 defines the pawnee's right where the pawnor makes default. Section 177 gives the defaulting pawnor a right to redeem the pawn at any time before the actual sale of it. Section 176 reads thus:—

“If the Pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale;

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.”

In construing this section too much importance should not be given to the semicolon in the first paragraph. In a cases where the pawnor makes default, the pawnee has three rights: (i) he may bring a suit against the pawnor upon the debt or promise, and (ii) he may retain the pawn as a collateral security, or (iii) he may sell it on giving the pawnor reasonable notice of the sale. The right to retain the pawn and the right to sell it are alternative and not concurrent rights. While the pawnee retains, he does not sell; and when he sells he does not retain. But the pawnee has the right to sue on the debt or the promise concurrently with his right to retain the pawnee or to sell it. The retention of the pawn does not exclude this right suit, since the pawn is a collateral security only. Nor does the sale of the pawn destroy this right the pawnor is still liable on the original promise to pay the balance due. The sale does not give a fresh starting point of limitation for a suit to recover the balance, see *Yellappa vs. Desayappa*(1). Similarly the institution of a suit upon the debt or promise does not reduce the pledge to a passive lien and destroy the pawnee's to sell the pawn. The right, of sale is necessary to make the security effectual for the discharge of the pawnor's obligation and

(1) (1901) I.L.R. 24 Allahabad 251 I.L.R. 30 Bom. 218.

the right continues inspite of the institution of the suit. The point in issue arose directly for decision in suit No. 860 of 1945, *Gorakhram Sadhuram vs. Agar Chand Chunilal*(1), decided by Sarkar, J. on August 5, 1952. In that case Sarkar, J. observed:—

“I have already said that some of the sales took place after the suit had been filed. I did not understand learned counsel for the defendant to make any special point on this. Nor do I myself find that this makes any difference the pledgee has admitted the right to sell. I do not see that he loses this right by filing a suit.”

It is to be observed that this opinion was not challenged on appeal though some of the other findings of Sarkar, J. were sataside in *Agarchand Chunilal vs. Gorakhram Sadhuram*(2) decided on January 17, 1957.

The above conclusion sufficiently disposes of the first contention raised by Mr. Deb. I may add however that even if it be assumed that the right of sale out of Court is alternative to the right to institute a suit on the debt or promise, I am by no means satisfied that the two alternatives are mutually exclusive and that the exercise of one alternative right destroys all future recourse to the other alternative. Mr. Deb relied upon the following observation of Lord Simonds in *Chichester Diocesan Fund vs. Simpson*(3).

“These two words are joined or separated by the word “or,” a particle of which the primary function is to co-ordinate two or more words between which there is an alternative. It is, I think, the only word in our language apt to have this effect, its primary and ordinary meaning is the same, whether or not the first alternatives is preceded by the word “either.”

The House of Lords affirmed the judgment of the Court of Appeal in *In re Diplock. Wintle vs. Diplock*(4), wherein Sir Wilfrid Greene, M. R. at P. 200 observed:—

“The word ‘or’ is prima facie, and in the absence of some restraining context, to be read as disjunctive, and, if a testator wishes to give his trustees a discretion to apply his property either to charitable or to benevolent objects, I do not myself know that other word in the English language he can more suitably use than the word ‘or’ I approach this question, therefore, on the view that the word ‘or’ is prima facie to be read as meaning what it says”

(1) Suit No. 860 of 1945 dated 5-8-1952 (unreported case).

(2) A.F.O.D. No. 12 of 1953 dated on 17-1-57 (unreported case).

(3) (1944) 2 Allahabad All.E.R. 67-73. (4) (1941) 2 All.E.R. 193.

volent objects, I do not myself know that other word in the English language he can more suitably use than the word 'or' I approach this question, therefore, on the view that the word 'or' is prima facie to be read as meaning what it says."

In the case above mentioned, a testator by his will gave the residue of his estate "for such charitable institution or institutions or other charitable or benevolent object or objects in England as my acting executors or executor may in their or his absolute discretion select." The House of Lords, Lords Wright—dissenting held that upon the true construction of this clause, the words "or benevolent" prima facie indicated an alternative purpose and, as there was nothing in the will to justify different interpretation the gift was void for uncertainty. The case was decided upon the principle that if the trustee is given a discretion to apply trust property for purposes, some of which are and some are not charitable, the trust is void for uncertainty. It is to be observed that the House of Lords did not decide that the power of the trustees to select a benevolent object would cease as soon as they would select a charitable object and devote a part of the trust fund to it. I think that when the word "or" is used in relation to two or more alternatives, it is not necessarily the case that the alternatives are mutually exclusive. The question as to whether they are mutually exclusives or not must be determined by applying the general rule that words should be construed to ascertain the intention of the provision in question to be collected from the whole of its terms, see *Horsely vs. Caldwell*(1). On a true construction of section 176. I am satisfied that the right of the pawnee to sue upon the debt or promise does not exclude or destroy his right to sell the pawn.

Mr. Deb contended Secondly that the notice dated February 6, 1960 was not a reasonable notice of the sale within the meaning of section 176 because (a) the notice does not refer to the actual sale which is going to be held and (b) because it does not give the place, date and time of the sale. On the first branch of his contention, Mr. Deb argued that the notice dated February 6 1960 was a notice of an intention to sell and that such notice is not enough. I am unable to accept this contention. The notice stated that in default of payment of the debt due to the defendant on or before the 18th February, 1960. "The under noted shares, or such of them as the bank may decide to sell will be sold by the Bank in exercise of its rights and powers as pledges and the net proceeds applied in reduction of your indebtedness." The notice gave a reasonable time to the plaintiff to pay the debt and redeem the pawn and definitely and clearly stated that in default of payment within the time mentioned the defendant would, sell the shares or such of them as the defendant might decide to sell. The word "Sale" in section 176 means intended

(1) (1946) 73 C.L.R. 304 314.

sale as opposed to the expression "actual sale" in section 177. Section 176 requires notice of the intended sale. Such notice was sufficiently given by the letter dated February 6, 1960. Mr. Deb relied upon the decision in *Co-operative, Hindusthan Bank Ltd. vs. Surendra Nath Dey*(1), and the unreported decision in A.F.O.D. No. 12 of 1953 dated 17-1-1953 (Calcutta). Both these cases are distinguishable. In the first case, the notice could not reach the pawnor before the sale. Consequently the sale was not a sale on reasonable notice of it. Besides the notice there stated that failing payment by named date, the pawnee would arrange for the sale of hypothecated stock and on this ground this case was distinguished by Lahiri, J. in *Hulas Kumar vs. Allahabad Bank Ltd.*(2), where the Court upheld the validity of a notice which stated that the pawnee would arrange to effect sale of the securities as and when opportunity offered. I must say however that I see no essential distinction between the notices in the two cases and speaking for myself. I am not prepared to say that the wording of the notice in the case in *Co-operative, Hindusthan Bank Ltd. vs. Surendra Nath Dey*(1), was in any way defective. In the unreported case decided by S. R. Das Gupta, J. and myself the pawnee had not given any notice of the sale at all. In that case the pawnee gave a notice in writing dated April 10, 1946 calling upon the pawnor to make immediate payment of the debt and take back the goods and stating that in default compliance with the requisition within two weeks the pawnee would take further steps for the recovery of his dues and hold the pawnor liable for costs. The notice was not a notice of intended sale at all; it did not state that in default of payment the pawnee would proceed to sell the goods. In that case there was also evidence to show that the pledged goods were re-conditioned at the pawnor's request for the sole purpose of enabling the pawnee to sell them; the pawnor had therefore knowledge of the pawnee's intention to sell; nevertheless it could not be said that the pawnor had received reasonable notice of the sale or any notice giving him reasonable time to redeem the pledged goods and stating that in default of payment the pawnee would proceed to sell the goods.

On the second branch of his second contention Mr. Deb argued that the notice dated February 6, 1960 is not a reasonable notice of the sale as it did not give the place, date and time of the sale. I am unable to accept this contention also. It is true that in *Grisson Knitting Works, Ludhiana vs. Luxmi Commercial Bank Ltd.*(3), Tekchand, J. observed that a notice merely of an intention to sell at some future date without specifying the date, time or place of the sale cannot be deemed a reasonable notice. With respect I am unable to agree with these observations. In the same case Meherchand, J. differed from the opinion of Tekchand, J. Besides Tekchand, J. based his

(1) A.I.R. (1932) Calcutta 524; I.L.R. (1932) 10 Calcutta 667. (2) A.I.R. (1958) Calcutta 644. (3) A.I.R. (1960) Punjab 98-107.

conclusion on the American Law which materially differs from our law on this point. Under the law prevailing in the United States of America, in the absence of a special agreement, a sale of the pledged property must be by a public auction and consequently as a general rule the pawnee must give the pawnor reasonable notice of the time and place of the sale (See "*Corpus Juris Secundum*—A complete restatement of the entire American law" by Francis, J. Ludes and Harold, J. Gilbert Francis, Vol LXXII, Arts. 59-60, PP. 117 to 123), under our law the pawnee is not bound to sell the pawn by public auction. He may sell it by private treaty after giving reasonable notice or the sale under section 176. Such a notice may be sufficiently given without specifying the place, date and time of the sale, see *Kuja Behari vs. Bhargava Commercial Bank*(1). Section 176 does not require that the notice of sale must in all cases give such particulars. The reasonableness of a notice varies from cases. The special circumstances of some particular case may require that a reasonable notice of the sale should give such particulars, but the onus is upon the pawnor to establish that such special circumstances exists. In the instant case the plaintiff has failed to discharge that onus. He has not called any oral evidence whatsoever. He has not proved any fact showing that in the particular circumstances of this case notice of the place, date and time of the sale should have been given. On receipt of the notice dated February 6, 1960 he did not write to the defendant stating that the notice was unreasonable or that the defendant should have given notice of the date, time and place of sale. On the contrary, the only plea taken by him in his letter dated June 27, 1960 was that in view of the institution of the suit for the recovery of the debt, the defendant had lost the right to sell the pledged goods. In the plaint as originally filed, the contention that the notice was not a reasonable notice was not raised. There is no evidence that the plaintiff has suffered or will suffer any prejudice by the absence of the specification of the place, date and time of the sale.

Mr. Deb contended thirdly that the proposed sale is mala fide having regard to (a) an offer made by the plaintiff in the interlocutory proceedings and repeated at the trial that the plaintiff was agreeable to pay four annas more per share than the highest offer to be obtained by the defendant in respect of the shares and (b) the fact that the shares constituted a part of the controlling block of shares in the British Indian Corporation Ltd. The defendant was not bound to accept the offer. The acceptance of the offer was bound to lead to complications. The offer cannot be satisfactorily worked out as pointed out by G. K. Mitter, J. in his judgment given on July 21, 1960 in the interlocutory proceedings in the suit. The allegation that the shares constitute a part of controlling block of shares in the British India Corporation Ltd. is not proved. The plaintiff has not established that the defendant is acting mala fide.

(1) I.L.R. 40 Allahabad 522; A.I.R. (1918) Allahabad 363; A.I.R. (1958) Calcutta 644.

Several other contentions were raised in the plaint in aid of the prayer for injunction restraining the defendant from selling the pledged shares; but those contentions are no longer pressed.

In view of these findings it must follow that the plaintiff has not made out any case for injunction.

The plaintiff has not yet instituted a suit for redemption of the shares. He has defaulted in payment of the debt due to the defendant. The debt is not fully secured. In these circumstances even I, were, in, a proper case, inclined to grant an injunction restraining sale of the shares I would have done so only upon the term that the plaintiff should deposit in Court the entire amount due to the defendant. Mr. Deb however, stated that the plaintiff was unable to deposit any money. Consequently in the exercise of my discretion I would, in any event refuse to grant the injunction.

There is no merit in this appeal. We pass the following order. The appeal be and is hereby dismissed with costs. Certified for two counsel. The interim injunction be and is hereby vacated and discharged.

Mr. Mukherjee orally prayed for stay of the operation of the order for a fortnight Mr. Roy Choudhury opposed this prayer. The prayer of Mr. Mukherjee is refused.

**C. N. Laik, J.:**— I substantially agree with the reasons given in the judgment just delivered by my learned brother Bachawat, J. and respectfully agree with the conclusion arrived at by my Lord but I like to add a few words.

As to whether the right of the suit is alternative or not on the interpretation of Section 176 of the Contract Act Mr. Deb, the learned counsel for the appellant, lays stress on the word 'or' after the words "Collateral security" and before the words "he may sell" and the punctuation 'semicolon' in the first paragraph of the said section. The learned counsel argues that the right of suit and sale are not concurrent and once the right of suit is availed or the right of sale is barred.

My view is that the said rights are not mutually exclusive but concurrent. My Lord has first now dealt with the above argument elaborately and has referred to many decisions. I need not repeat them but I may refer to a Bench decision of this Court in *Nayan Manjuri Dasi vs. Howrah Municipality*(1), where it has been held that it is some times necessary to read the conjunctions 'or' and 'and' as one for the other. The same view has been expressed by the Full Bench of Madras High Court in *Rayarappa vs. Kelappa*(2).

(1) A.I.R. (1925) Calcutta 1067.

(2) I.L.R. (1916) 40 Madras 594-602;  
A.I.R. (1918) Madras 1026-1030 (F.B.)

In a case arising out of an Income-tax Act, the word 'or' was interpreted by their Lordships of the Supreme Court where it was observed that in appropriate context 'or' might mean 'and' vide *Mazadaon Dock Ltd. vs. Commercial of Income tax and Excess Profit Tax*(1). There also it was argued that the assessment on one, would be a bar to the assessment on the other's but that argument was negatived by their Lordships in the Supreme Court. The instant case is one where the said interpretation should be followed.

In the case cited by Mr. Deb reported in *Chichester Diocesan Fund vs. Simpson*(2), which has been elaborately discussed by my Lord. I may point out that their Lordships at P. 73 of the said report observe, that it is possible that a context may justify that the meaning of 'or' is not exclusive. In my view the word 'or' in the context of section 176 justifies the said meaning. Moreover, their Lordships interpreted the word 'or' in a document and not in a statute in the said reported decision which should also be taken note of.

As to the argument of punctuation of Semicolon, which according to Mr. Deb is also conclusive to show that the rights are exclusive, I may add that their Lordships in the Supreme Court observed in the case of *Aswani Kumar Ghosh vs. Arabindo Bose*(3), to the effect that punctuation is after all a minor element in the construction of a Statute and very little attention is paid to it even by the English Courts. It may have some uses in some cases where there is doubt, but it cannot be allowed to control the plain meaning of a text. Here the plain meaning of section 176 should not be allowed to be controlled by semi colon.

It was argued on the other hand on behalf of the respondent that the marginal note in the said section 176 is made only for the benefit of the pawnee and not for the pawnor. This view also cannot be accepted, because the marginal note cannot be referred to for the purpose of construing a Statute (vide *Commerce of Income Tax vs. Ahmedbhai Umarbhai & Co.*(4). Marginal notes cannot also control the meaning of a body of a section. (See *Nalinakhya Bysack vs. Shyamsunder Halder*(5). Therefore my conclusion is that the word 'or' is an alternative between the two words 'retention' and 'Sale'. In other words, the pawnee under section 176 of the Contract Act has got the concurrent rights to sue, as well as either to retain or to sell.

On the second branch of Mr. Deb's argument that the notice mentioned in Section 176 of the Contract Act must mention the date, time and place of

(1) (1958) 34 I.T.R. 368; A.I.R. (1958) S.C. 861.

(2). (1944) 2 All.E.R. 60.

(3) (1953) S.C.R. 1-41; A.I.R. (1952) S.C. 369-383.

(4) (1950) S.C.R. 335-353;; (1950) A.I.R. S.C. 134-141.

(5) (1953) S.C.R. 533-538; (1953) A.I.R. S.C. 148-150.

the sale. In my view it cannot be laid down as a general proposition of law that no mention of date, time and place in the notice is necessary. It cannot also be equally laid down that the said three elements are absolutely necessary to bring a notice within the category of a reasonable notice within the meaning of section 176 of the Construct Act. It depends upon the facts of each case and no standard or guide can be laid down to govern all the cases. Take for example, a notice is given and served on the Pawnor in the evening of previous day informing him that the sale is going to be held next day at a given place and time. In my view the court should strike down that notice as unreasonable though it might state the place, date and time and fulfill the requirements of the section so to speak.

In my view there is some difference between a notice giving mere intention to sell and a notice of the intended sale. I am also of the view that a mere intention without giving specific particulars will not be enough and such notice will be unreasonable. But the notice in section 176 must be of the intended sale and the notice in the instant case is reasonable. The word 'the' before the word 'sale' in section 176 does not mean actual sale, as sought to be argued by Mr. Deb, because the legislature in that event could have used the word 'actual' also in section 176 as in section 177. The word 'the' has got no special significance. It only refers to a sale.

Before I part with this branch, I may refer to the said unreported decision in Appeal from Original Decree No. 12 of 1953 (Calcutta) of S. R. Das Gupta, J. sitting with my Lord. It is strenuously argued at the bar that the said decision is just opposite to the decision of the Division Bench in *Agarchand Chunilal vs. Gorakhram Sadhuram*(1), Sarkar, J. in the trial Court in Agarchand's case, A.F.O.W. No. 12 of 1953 Calcutta, noticed that the sale in the said case was held at the specific request of the defendant and also that no notice of sale had been given by the plaintiff to the defendant and then said "It is clear therefore that no notice of the sale, time or place of the sale need be given. All the authorities take that view." In the appeal S. R. Das Gupta, J. sitting with my Lord set aside the findings of Sarkar, J. on the question of notice.

In view of the principles laid down in *Madholal Sindhu vs. Official Assignee of Bombay*(2), where the sale was held at the request of the defendant, no notice under section 176 is at all necessary and the findings of Sarkar, J. on the question of notice should neither have been nor necessary to upset. The said alleged findings of Sarkar, J. should not be read without the context, moreover, they are not strictly findings but strong other dicta being not the bases for the decision. Hence in my view it would not be correct to say that

(1) (1958) A.I.R. Calcutta 644

(2) (1949) S.C.R. 441-462.

the said unreported decision was contrary to the decision reported in *Agarchand Chunilal vs. Gorakhram Sadhuram*(1).

The reasoning given by Tekchand, J. in *Grisson Knitting Works Ludhiana vs. Laxmi Commercial Bank Ltd.*(2), were adopted by Mr. Deb as his argument before us. But as has been found by my Lord Tekchand, J. drew the source of inspiration from the American Law and the principles laid down therein are admitted not correct. Moreover, Tekchand, J. expressly dissents from the Bench decision of this Court, viz. *Agarchand Chemical Case*, with which I respectfully agree I differ from the views of Tekchand, J. with great respect.

Lastly, the two considerations stated herein below would be sufficient in refusing to grant the injunction in the present case, which is a discretionary relief.

In the earlier suit by the Respondent Bank that is Suit No. 858 of 1959 for recovery of its dues, the appellant failed the written statement to the effect that the plaintiff must sell the shares and without selling those shares, the Bank would not be entitled to proceed against the defendant in the suit for recovery for money. I may state that the pleadings in the said suit have been relied on by appellant in this suit, out of which the present appeal arises. And, as a matter of fact, during the pendency of the said suit, when the notice of sale dated 6th February, 1960 is given, the present suit is filed by the appellant now objecting that the Bank cannot proceed with the sale of the shares because of the pending suit. This is a conduct which must be taken note of and which alone should disentitle the appellant for getting relief in the way of injunction. The pecuniary compensation being also the adequate relief in the instant suit, the courts should be reluctant in granting injunction in favour of the plaintiff appellant. The appellant in his letter dated 25th June, 1960 has himself given the market value of the shares. Hence I cannot accept Mr. Deb's argument that the shares which have been pledged, cannot be compensated for pledged, cannot be compensated for pecuniary less if injunction is not granted. On these grounds also I concur in dismissing the appeal with costs.

*Appeal dismissed.*

(1) (1958) A.I.R. Calcutta 644.  
(2) (1960) A.I.R. Punjab 98.

(1) A.I.R. (1958) Calcutta 644.

## CRIMINAL REVISION

*Before the Hon'ble Mr. Justice Amaresh Roy.*

Criminal

1962

September, 18.

TARAK NATH DATTA

Vs.

THE STATE

*The Bengal Shops and Establishments Act, 1940 (Bengal Act XVI of 1940), Section 6(1)  
—Violation of—Conviction under—Requisites—Evidence.*

Unless it is shown that the door of the shop had been opened for some purpose "relating to business," mere opening of the door on a closed day does not infringe Section 6(1) of the West Bengal Shop and Establishments Act, 1940.

In a prosecution under the Act, the identity of the Shop concerned must be established.

It is not sufficient for a conviction for violation of Section 6(1) of the Act to rely only on the evidence of the Inspector of Shops and Establishments and his peon.

The material facts will appear from the Judgment:—

*Bhupendra Kumar Dey with Profulla Kumar Roy (Jr.)—for the  
Petitioner.*

*Purnendu Narayan Biswas—for the Opposite Party.*

The Judgment of the Court was as follows:—

**Amaresh Roy, J.:**—This Rule is directed against an order of conviction passed against the petitioner under the Bengal Shops and Establishments Act, 1940. The prosecution case is that the petitioner was the owner of a furniture shop under the name and style of Daffodil Furnishing Stores and that on the 13th July 1961 (Thursday) which was a full closing day of the shop, he was attending a customer at 6-28 P.M. and thereby infringed section 6(1) of the Bengal Shops and Establishments Act, 1940. The accused pleaded not guilty. At the trial the prosecution examined two witnesses, P.W.1 being Satya Ranjan Das Gupta, Inspector Shops and Establishments, Calcutta and P.W.2, Ram Prasad Singh, who was the peon of the first witness. The only evidence that has been adduced throughly these witnesses is that on that day at that hour, that is, about 6-30 P.M. on 13th July 1961, Tarak Nath Dutt was found attending a customer. Prosecution also proved the notice that is hung up under the Act (Ext. 1) which was issued on 14th July 1959. That document Ext. 1 shows that the shop of which Tarak Nath Dutt was the owner is named Daffodil Furnishers Defence proved another notice which was issued in respect of this shop on 2nd August 1961. There also the shop of

Tarak Nath Dutt is mentioned to have the name Daffodil Furnishers. I have already mentioned the prosecution in the petition of complaint mentioned that the infringement alleged was in respect of the shop named Daffodil Furnishing Stores. In cross-examination of P.W.1 when this loud discrepancy was pointed out to P.W.1 he glibly said: "In complaint I meant that." To say the least this attempted explanation of P.W.1 has not helped the prosecution because whatever P.W.1 may have meant, the fact remains that the prosecution was in respect of infringement alleged by opening a shop named Daffodil Furnishing Stores and prosecution has failed to prove that by any evidence.

~~Moreover regarding the infringement of the Act itself, the only evidence is the bland statement of P.W.1 supported by no other than his own peon that the accused was seen attending a customer. Who that customer was the prosecution has not mentioned. for less has either established has identity or called him as a witness. P.W.1 admitted in cross-examination that there are numerous shops close to the shop he had visited. Yet not one person from that locality has been brought as a witness to support the prosecution story. Therefore, it has not been established by any reliable evidence that the accused had attended to any customer at the hour and date mentioned by prosecution, whatever may be his shop.~~

Mr. Purnendu Narayan Biswas, learned Advocate, appearing for the State has argued that on the first point about identity of the shop, the same address appearing in the two notices, Ext. 1 and Ext. A, that is, 240/2, Bipin Behari Ganguly Street should be taken as sufficient material to establish that the two shops Daffodil Furnishers and Daffodil Furnishing Stores are identical. In the realities of the business areas in Calcutta, particularly the area of Bipin Behari Ganguly Street this argument of Mr. Biswas is entirely pointless because it is common knowledge that at the same address numerous shops often times carrying on business in the same commodity are found.

The second argument of Mr. Biswas was that even attending a customer is not necessary but only opening the door is sufficient to infringe section 6(1) of the Act. Section 6(1) provides:

"Every shop shall be entirely closed \* \* \* ." The word 'closed' has been defined in section 2(1) of the Act thus:

(1). "Closed" means not open for the service of any customer or for any other purpose whatsoever relating to business." By referring to this definition Mr. Biswas argued that if the door of the shop is open on a closed day, that is enough to bring the owner of the shop within the mischief of the

penal section of the Act, that is section 17, by infringement of section 6(1). This argument of Mr Biswas also leaves out of consideration the very important part of the definition of the word 'closed', where it has been defined to include any purpose whatsoever. That important part is the last three words in the definition "relating to business." Therefore, unless it is shown that the door of the shop had been opened for some purpose relating to business, mere opening of the door on a closed day does not infringe section 6(1) of the Act. The contentions of Mr. Biswas must, therefore, be rejected and I feel compelled also to observation unmerited prosecution like the present one reduces a piece of legislation enacted for the benefit of the employees of shops and establishments to ridicule and also to a weapon of unfair harassment by conscienceless officers who did not care to perform their duties properly but revel in harassing innocent shop owners.

The Rule is made absolute. The order of conviction and sentence passed against the petitioner set aside.

Fine, if paid, will be refunded.  
N. C. S.

*Rule made absolute.*

### CIVIL REVISION

*Before the Hon'ble Mr. Justice P. N. Mookerjee and  
the Hon'ble Mr. Justice Laik.*

Civil

1962

January, 2.

SK. FAZLUDDIN

Vs.

SM. ZUBEIDA KHANAM.

*West Bengal Premises Tenancy Act, 1956 (West Bengal Act XII of 1956), Section 17(2), as amended by Bengal Premises Tenancy (Amendment) Act, 1959 (West Bengal Act XXVII of 1959) if retrospective in operation—Duty of Court—Primary points of enquiry under unamended (17(2) of W. B. Act XII of 1956.*

The amendment made to Section 17(2) of the West Bengal Premises Tenancy Act, 1956, by the West Bengal Premises Tenancy (Amendment) Act, 1959, came into operation on 29 February 1960. There is nothing in the amending Act of 1959 itself or in any other relevant material to indicate that any retrospective operation was intended to be given to the said amendment the amendment would then be prima facie and to all intents and purposes prospective, and would affect only suits or proceedings instituted or filed after the said amendment. Suits or proceedings, which were pending at the date when the said amendment came into force, would have to be decided under the unamended section 17(2).

Under the original or unamended section 17(2) of the West Bengal Premises Tenancy Act, 1956, it was obligatory upon the Court, wherever there was a "dispute" to the amount of rent payable under section 17(1) of the Act, to determine that dispute.

In an investigation or enquiry into a dispute under Section 17(2) of The West Bengal Premises Tenancy Act, 1956, the primary points of enquiry will include investigation (1) as to the rate of rent of the premises in suit, (2) as the amount of rent payable by the defendant under Section 17(1) of the Act, (3) as to the question of bona fides or mala fides of the various deposits made by the defendant petitioner with the Rent Controller, on which reliance is placed on his behalf to get rid of the plaintiff's allegation of default.

The material facts will appear from the Judgment:—

Satya Prosad Sen—*for the Petitioner.*

Jitendra Kumar Sen Gupta with Asoke Kumar Sen Gupta—*for the Opposite Party.*

The judgment of the Court was as follows:—

**P. N. Mookerjee, J.:**—This Rule is directed against an order of the learned Judge, striking out the petitioners written statement in the pending suit for ejectment under section 17(3) of the West Bengal Premises Tenancy Act, 1956. The instant suit was instituted on November 30 1959. The plaint alleged the usual service of the notices to quit and requisite defaults on the part of the defendant to disentitle him from the protection of the relevant rent control legislation, to wit the above Act of 1956.

The suit was contested by the defendant who, in his written defence denied, inter alia, the plaintiff's allegation of default.

In the course of the suit, the plaintiff applied for an order under section 17(3) of the above West Bengal Premises Tenancy Act, 1956. The application appears to have been contested when it was, first taken up for hearing. The defendant examined himself to deny the plaintiff's allegation of default. Thereafter, however due to the court's inability to take up the case for certain pre-occupations, the matter had to be adjourned from time to time and, ultimately, when, on March 13, 1961, the case was called on for hearing, the defendant applied for time. The defendant's prayer was refused by the learned trial Judge and, eventually the matter section 17(3) appears to have been decided ex-parte after the plaintiff had led evidence in support of his case.

The learned trial Judge found in his order, which is now under challenge, that the rent of the disputed premises at all material times and for the relevant period was Rs. 300/- per month, as alleged by the plaintiff, and not Rs. 250/- per month, as claimed by the defendant. The learned trial Judge further found that the defendant, on the above finding, had been a defaulter for several months and that he had also been a defaulter in respect, particularly, of the month of January, 1960, for which rent was deposited at the rate of Rs. 250/- per month in court on February 15, 1960, although the summons of the suit, according to the learned trial Judge, had been served on the defendant on or about January 6, 1960.

Against the above order of the learned trial Judge, striking out, the defendant petitioner's defence against ejectment the present Rule was obtained by the said defendant.

The first contention, which has been raised before us by Mr. Sen, in support of this Rules, is that the learned trial Judge was in error in overlooking the mandatory provision of section 17(2) of the West Bengal Premises Tenancy Act, 1956. Mr. Sen contends that there was, on the face of the records and on the face of the impugned order of the learned trial Judge, a dispute between the parties as to the amount of rent, payable for the disputed premises. Mr. Sen, also points out that, on the relevant materials, there was also clearly a dispute as to the validity or otherwise of the deposit, made by the defendant in court of the rent for January, 1960, on February 15, of the same year. He accordingly, contends that the learned trial Judge should have dealt with the matter under section 17(2) of the above Act and passed proper orders thereon and, even if the said order was against the defendant to the effect that he was a defaulter, the amount of arrears had to be found by the learned trial Judge and reasonable time had to be given for deposit of the said amount in Court and, only in default of such deposit, could his written statement be struck out under section 17(3).

Mr. Sen Gupta, appearing on behalf of the plaintiff opposite party, raised an initial objection to the above argument of Mr. Sen by pointing out that the whole basis of the said argument was the old section 17(2) of the 1956 Act, but to the instant case, and at least, having regard to the fact that the dispute as alleged by Mr. Sen, was continuing even with regard to the deposits, made after February, 1960, the relevant statutory provision, applicable to the case would be not the old section 17(2) of the 1956 Act but the amended one, under which it was obligatory on the defendant, if he wanted relief under that sub-section, to apply to the Court, as prescribed therein.

In our opinion, the amended section 17(2) cannot apply to this case, in which not only the suit but also the application under section 17(3) were made prior to the coming into force of the above amendment. The amendment in question came into operation on February 29, 1960. There is nothing to indicate in the statute itself or in any other relevant material that any retrospective operation was intended to be given to the said amendment. The amendment would, then, be *prima facie* and to all intents and purposes, prospective. If that be so, it can only affect suits or proceedings, instituted or filed after the said amendment and suits or proceedings, which were pending at the date when the above amendment came into force, would have to be

decided under the earlier or unamended statutory provision. In the present case, as we have said above, both the suit and the instant proceeding under section 17(3) were pending at the date, when the above amendment came into operation. In such circumstances, we are bound to hold that the present case must be governed by the old or unamended section 17(2) of the West Bengal Premises Tenancy Act, 1956.

Under the said section (original unamended section 17(2)) it was obligatory upon the court, whenever there was a 'dispute' to the amount of rent, payable under section 17(1) of the Act to determine that dispute. That was the mandate of this statute, as expressed in the section itself and to that has been added the express authority and judicial mandate of several decisions of this Court, interpreting the said section (section 17(2)) as imposing a duty upon the Court to fix reasonable time for deposit of the amount, determined by the Court as payable by the tenant, under section 17(1), under the aforesaid sub-section (2) of Section 17. In this view, we must hold that the order of the learned trial Judge is bad and cannot be supported. It is complete and premature and further, the basic finding of the learned trial Judge also appear to be too summary and need further consideration. The matter, accordingly will have to go back for further, fuller and proper investigation, which we have indicated above. To facilitate the enquiry, we may indicate the primary points of investigation which will arise, namely, as to the rate of rent of the disputed premises, as to the amount of rent, payable by the defendant under sub-section (1) of section 17 and, further, as specifically raised the allegation upon the question of bona fides or mala fides petitioner deposits, made by the petitioner defendant of the Rent Controller, on which reliance are placed on his behalf of getting rid of the plaintiff's allegation of default. These, course, will be the primary matters for enquiring in the proceeding, which is now to be taken up by the lower court, but there may be other or further matters, on which decision may be necessary. It will be for the Court below to decide the appropriate scope of the enquiry which it will now make in pursuance by the present order and in terms thereof.

In the above view, we make this Rule absolute, set aside the order, complained against in this Rule and direct that the case should go back to the learned trial Judge for a proper decision of the plaintiffs application under section 17(3) of the above Act in the light of the observations, made hereinbefore, and keeping, practically, in view the provision of the old or unamended section 17(2) of the above Act which, as we have sufficiently indicated hereinbefore, would be the relevant provision, application to this case.

It is only necessary to mention, in facts and circumstances of this case that it will be open to either party to apply to the learned trial Judge to adduce further or additional evidence for purposes of disposal of the application under section 17(3) and, if any such application is made, the learned trial Judge will consider it on the merits and deal with it in accordance with law.

There will be no order as to costs in this Rule.

Let the records godown as quickly as possible and let the instant proceeding and also the connected suit be expedited as much as possible.

**Laik, J.:**—I agree.  
N. C. S.

*Rule made absolute.*

### CIVIL REVISION

*Before the Hon'ble Mr. Justice D. N. Sinha.*

Civil

1955

August, 22.

GOBINDA LAL KHAN

Vs.

THE STATE OF WEST BENGAL.

*Bengal Excise Act, 1909 (Bengal Act V of 1909),—Sections 42, 85—Conditions of Licence for retail vend of country spirit—Licence, if competent to disown terms of licence after acceptance—Power to inspect shop under Section 66—Superintendent of Excise, if entitled to exercise under Rule 80 of Notification No. 595 S.R. dated 30, March 1915.*

A license for retail vend of country spirit under the Bengal Excise Act, 1909, consists of two parts. The first part contains the terms specially applicable to retail vending of country spirit. According to the second part, the general conditions applicable to Excise and Opium Vend Licences are also applicable to retail vending of country spirit. There is nothing in the Act to show that these conditions have to be prescribed by Rules made under section 85 of the Act. On the other hand, section 42 of the Act indicates that the Provincial Government can prescribe restrictions to such conditions.

The conditions of the licence are such as appear on the face of the licence. The petitioner, having taken the licence, cannot be permitted to disown its terms.

A Superintendent of Excise may exercise the power to inspect an excise shop conferred by Section 66 of the Act, under Rule 80 of the Rules made under Notification No. 595 S.R. dated 30, March 1915.

The material facts will appear from the Judgment:—

Arun Kumar Dutta, Shyamapada Choudhury—for the Petitioner.

The judgment of the Court was as follows:—

\* Civil Order No. 2641 of 1955.

**D. N. Sinha, J.:**—This is an application by a vendor whose excise licence has been cancelled. The excise licence is in respect of a country spirit shop at Rishra. Mr. Dutta has taken two points which are as follows:

Firstly, he says that the cancellation could only be supported by a reference to general conditions and he says that these general conditions have not been framed by the Provincial Government. Under section 42 of the Bengal Excise Act, 1909, the authority granting a licence may cancel the same in the event of any breach by the holder thereof or by any of his servant or by any one acting on his behalf of any of the terms and conditions of the licence. The licence, a copy whereof is annexed to the petition, consists of two parts. The first portion contains the terms specially applicable to retail vending of country spirit. At the bottom of the terms, however, it is said that the general conditions applicable to Excise and Opium Vend licences are also incorporated. Clearly, therefore, the terms and conditions of the petitioner's licence not only consists of the special conditions but also of the general conditions. There is nothing in the Act to show that these conditions have to be prescribed by rules made under section 85. On the other hand section 42 indicates that the Provincial Government can prescribe restrictions to such conditions. The conditions are such as appear on the face of the licence. The petitioner having taken the licence cannot now be permitted to disown the terms.

The second point taken is that the Superintendent of Excise had no authority to inspect the shop. Mr. Dutta had overlooked rule 80 framed under section 66 which clearly lays down that officers above the rank of Inspectors can enter and inspect any excise shop.

Mr. Dutta then tried to enter into the merits of the case but I am afraid in an application of this description I cannot enter into the merits.

The result is that no ground has been made out for my interference and the application is, therefore, summarily rejected.

*Application rejected.*

N. C. S.

## CIVIL RULE

*Before the Hon'ble Mr. Justice R. S. Bachawat.*

Civil

1963

January, 7.

HAR BHAJAN SINGH

Vs.

BISHU ROY &amp; ORS.

*Workmen's Compensation Act Rule 41 of Workmen's Compensation Rules—Application for Setting aside ex parte order awarding compensation—Limitation for—Indian Limitation Act, 1908—Articles 164 and 181.*

An application by the petitioner for setting aside an ex parte order awarding compensation in favour of the opposite parties is an application under Rule 41 of the Workmen's Compensation Rules read with Rule 13 of Order 9 of the Code of Civil Procedure, 1908.

In the absence of any specific period of limitation for such an application provided under the Workmen's Compensation Act or Rules, and assuming the Indian Limitation Act, 1908, to apply to such application, it will be governed by Article 181, and not by Article 164, of the Limitation Act.

The material facts will appear from the Judgment:—

Monoranjan Basu—for the Petitioner.

No one appear—for the Opposite Party.

The judgment of the Court was as follows:—

**Bachawat, J.:**—This Rule is directed against the order of the Additional Commissioner Workmen's compensation, West Bengal dated the 8th March 1963, dismissed the application of the petitioner for setting aside the ex parte order for compensation dated the 21st December, 1962 awarding compensation in favour of opposite party No. 1 in claim Case No. 2815 of 1961 on the ground that the application being filed on January 25, 1963 was barred by limitation. My attention has been drawn to any section of the "Workmen's compensation Act or to any rule framed there under providing for a specific period or limitation for such an application. The application was made under rule 41 of the workmen's compensation rules read with order 9 rule 13 C.P.C. Assuming that the application is governed by the Indian Limitation Act, it does not appear that the application is barred by limitation. Article 164 of the limitation Act governs an application to set aside an ex parte decree. In the absence of a specific Article in the Limitation Act an application to set aside an ex parte order would be governed by the residuary Article 181, in this view of the matter, I hold that the Additional Commissioner illegally dismissed the application on the ground of limitation. On the merits he was satisfied that there was sufficient cause for the non appearance of the petitioner. I pass the following order:—

\* Civil Rule No. 1483 of 1963.

The Rule is made absolute. The impunged order dated the 8th March, 1963 is set aside. The restoration petition is allowed, the ex-parte order dated the 21st December, 1962, is set aside, and the claim case No. 2815 of 1961 is restored to the file. The tribunal below is directed to bear and dispose of the case in accordance with law. There will be no order as to costs.

N. C. S.

*Rule is made absolute.*

## CIVIL RULE

*Before the Hon'ble Mr. Justice D. N. Sinha.*

P. V. RAO also known P. VANKATA RAO

Civil

Vs.

1962

THE GENERAL MANAGER SOUTH EASTERN RAILWAY  
 GARDEN REACH

May, 10

*Departmental Enquiry—Procedure—Proof of contents of document—Rules of natural justice, circumstances violating—Preliminary objection of failure to exhaust alternative legal remedy, when not sustainable—Constitution, Article 226—Power of High Court to interfere.*

Where the real point to be proved was the content of an application for appointment in a departmental enquiry, and the original application was either missing or not produced, and all that was produced was a so-called summary of candidates summoned for interview by the Railway Service Commission and all that was proved was the two signatures of the two members of the Commission who had interviewed the candidates, on such alleged summary, by a clerk who was not the clerk-in-charge making the summary or having any personal knowledge of the same, such evidence was of no value, and the charge of making false representation in his said application was not proved against the accused petitioner.

Where the accused petitioner was given a chargesheet, and was asked to procure a "defence counsel," but was promptly asked not to leave station, and no arrangement was made by the Railway Administration for the attendance at the departmental enquiry of the Defence Counsel ultimately chosen by the accused petitioner, the accused petitioner was greatly prejudiced thereby and acted wisely in not participating in the enquiry, and there was a gross violation of the rules of natural justice, and the proceedings of the enquiry was vitiated.

Where the proceedings of the departmental enquiry are vitiated by violation of the rules of natural justice, the preliminary objection that the petitioner ought to have preferred an appeal against the impunged order, and had not exhausted all his legal remedies, failed.

Where there has been a violation of the rules of natural justice, the omission to avail of the alternative legal remedy is not fatal, and the High Court has always the right to interfere under Article 226 of the Constitution.

The material facts will appear from the Judgment:—

Noni Coomar Chakravarty—for the Petitioner.

Ajoy Kumar Basu—for the Opposite Parties No. 4.

The judgment of the Court was as follows:—

**D. N. Sinha, J.:**—The facts in this case are shortly as follows: In October, 1962 the petitioner passed the Secondary School-leaving certificate examination of the Andhra University, which it is stated, is equivalent to Matriculation Examination of other Universities. In 1955, the petitioner appeared in the I.Sc. Examination and passed in part III subjects viz., Biology Chemistry and Botany but failed in parts I and II subjects viz., English and Vernacular. On the 22nd June, 1956 the Railway Selection Board issued an advertisement in "The Statesmaan", inviting applications for the post of Railway guards grade 'C'. Two qualifications were mentioned, the first being that the candidates should have passed "matriculation or equivalent examination" and the second was proficiency in games and sports. It appears that under the Indian Railway Establishment Manual, the qualification for direct recruits of probationer guards is "matriculation or its equivalent examination" (See para 19, page 18 of the Indian Railway Establishment Manual). The petitioner alleged that pursuant to the said advertisement, he sent in an application in the prescribed form giving the "requisite particulars". On or about the 7th September, 1956 at the direction of the Railway Selection Board at Calcutta, the petitioner appeared for an interview at Adra, and sat for a competitive written examination in handwriting in English as also the vica voce test. The petitioner was chosen amongst a number of candidates and on the 21st March, 1957 he was appointed to the post of probationer guard grade 'C' on a scale of pay of Rs. 80—170/- per month plus usual allowances. The letter of appointment was issued by the Coal Manager, South Eastern Railway, Adra. The petitioner thereupon went through a course of training including a term at the Training School at Sini. At the Railway Training School he passed the Guardship examination and was put in charge as a guard of goods train at Adra. After more than a year, on the 19th July, 1958 the Coal Manager, Adra, wrote to the petitioner asking him to see the Coal Manager at his office with the original S.S.L.C. and Intermediate certificates. The petitioner states that he produced before the Coal Manager, S.S.L.C., I.Sc. transfer certificate and the Intermediate examination mark-sheet. On the 29th September, 1958 the Coal Manager replied saying that the petitioner had stated in the original application from that he had passed the Intermediate examination in the first class in September, 1955 with Biology, Physics and Chemistry, but it appeared from the transfer certificate issued by the Principal A. V. N. College, Visakhapatnam that he had not passed the I.Sc. examination. He was called upon to explain the matter. According to the petitioner, he appeared before the Coal Manager personally and explained to him that he had not made any statement to the effect that he had passed the I.Sc. examination in the first class and requested him to call for the original

application and satisfy himself as to the truth or otherwise of the petitioner's explanation. After this nothing happened for a period of nearly two years. On the 30th July, 1960 the petitioner was served with a charge-sheet by the Coal Manager, Adra, a copy whereof is annexure "B" to the petition. The charges were that the petitioner had applied to the Railway Service Commission for the post of a Guard stating that he had passed the Intermediate Examination in the first class in September, 1955 whereas it appeared that he had failed in parts I and II and he thus obtained an appointment as a Guard by a false declaration of educational qualification and by concealment of facts. He was called upon to show cause why he should not be dismissed from service. On the 15th October, 1960 the petitioner showed cause by stating that in his application form he had only stated that he had passed Part III in the Intermediate Examination in September, 1955, which statement was true and not false, and that the petitioner had not made any false declaration in the application form. In reply to this, on the 30th November, 1960 the District Operating Superintendent, Adra, wrote to say that the charge-sheet dated 30th July, 1960 was cancelled and a fresh charge-sheet was enclosed. In the fresh charge-sheet, it was stated that the petitioner was guilty of service mis-conduct inasmuch as he applied to the service Commission for the post of a Guard stating that he had passed the Intermediate Examination in the first class in September, 1955 whereas in fact, he failed in Parts I and II. The petitioner had thereby concealed his real educational qualification and gave a false declaration with a view to securing an appointment in the Railway and was thus guilty of mis-conduct. He was asked to show cause why he should not be dismissed from service. To that the petitioner showed cause on the 13th December, 1960 stating that he had already submitted his explanation to a similar charge and had nothing to add. On the 19th April, 1961 the District Operating Superintendent, Adra, wrote to the petitioner that the "competent authority" had ordered that an enquiry committee should be composed and Shri D. Isiah, Asstt. Commercial Superintendent, Agra had been nominated for that purpose. The enquiry was to be held on the 28th April, 1961. It was pointed out that under the rules the petitioner was entitled to appoint a defence counsel who must be a railway employee or a member of the Railway Union. He was also asked to produce a consent letter from his defence counsel. He was also asked to name his witnesses and his reply was to reach the D.O.S., Adra by 24-3-61 "to enable necessary arrangements being made to have the staff concerned spared in time." On the 23rd April, 1961 the Personal Officer directed the petitioner not to leave station on any account without the previous consent of the said officer and that he was to be booked on duty till the enquiry was completed. On the 23rd April, 1961 the petitioner asked for a copy of his explanation. On the 25th April, 1961 the petitioner wrote to the D.O.S., Adra stating that he could not secure

a defence counsel for the enquiry to be held on 28-4-61 and asked for an extension of seven days to secure a suitable defence counsel. On the 27th April, 1961 the D.O.S. informed the petitioner that he would give postponement of one day only and that he was to appear on the 25th April, 1961 with his defence counsel. On the 27th April, 1961 the petitioner replied by saying that he nominated Sri Jaganadha Rao, Section Controller, Kharagpur as his defence counsel and that he had given his consent. He requested that arrangement should be made for enabling the defence counsel to attend at the place of enquiry. He further requested that the hearing should be postponed and explained that the delay in obtaining a defence counsel was due to the fact that he was not allowed to leave headquarters. On the 29th April, 1961 the enquiry commenced. No arrangements were made for the appearance of the defence counsel. Only one witness, Sri P. C. Das Gupta, a clerk of the Railway Selection Board appeared and attempted to prove a certain document described "as the summary of candidates" prepared by the Railway Service Commission. It is not disputed that this clerk was not in charge of making the summary and that he was not working at the relevant time with the Railway Service Commission, Calcutta, when the summary was made. He merely came and proved the signature of two members of the Railway Service Commission who had signed this summary but who themselves were not called. No other evidence was called. According to the petitioner, this witness could not be cross-examined as the Railway Administration made no arrangement for the production of the petitioner's defence counsel. On the 29th April, 1961 the petitioner was asked to submit his defence statement. To that the petitioner replied that his defence statement. To that the petitioner replied that his defence counsel was not produced at the enquiry and he could not therefore be called upon to file a defence statement and requested that the enquiry be re-commenced after arranging the defence counsel to be present. This, however, was not heeded, and on the 3rd May, 1961 the enquiry officer made a report finding the petitioner guilty of the charge of mis-conduct. The report is annexure "S" to the petition and states that on the strength of the summary made by the Railway Service Commission and the mark-sheets it is possible to state that the petitioner had declared in his original application that he passed the Intermediate examination in the first class, while he had actually passed only Parts I and II of the Intermediate examination. It had thus been established that he had concealed his real educational qualification and gave a false statement with a view to securing an appointment in the Railway. It was, therefore, established that the petitioner was guilty of the charge of mis-conduct. On the 5th May, 1961 the second show cause notice was issued and the petitioner showed cause and asked for a personal hearing. On the 24th May, 1961 an order was made dismissing the petitioner from service. According to the petitioner he was not given any hearing. This application was made on the 22nd June 1961.

The points taken by Mr. Chakravarty on behalf of the petitioner are (1) that there has been a violation of the rules of natural justice and (2) that upon the evidence on record there could not be a finding that the petitioner was guilty of mis-conduct, and this error appears on the face of the record. The third point taken is that the petitioner was appointed by the Coal Manager, Adra and that the charge-sheet and enquiry made under orders from D.O.S., Adra as also the order of dismissal made by him and were in violation of the provisions of Article 311(1) of the constitution.

A preliminary objection was taken on behalf of the effect that the petitioner ought to have preferred an appeal against the order and that he had not exhausted all his legal remedies. Before dealing with the legal aspect of the matter let us see what exactly happened. The petitioner made an application for being appointed as a Guard. The minimum qualification laid down for appointment as a Guard is that a candidate should have passed the matriculation of equivalent examination. It is not disputed that the Secondary School leaving certificate of the Andhra University is an "equivalent examination." What is stated by the respondent is that in his original application the petitioner had represented that he had passed the Intermediate Science Examination, in Biology, Chemistry and Physics, whereas in fact, he had failed in that examination and thus obtained a post in the Railway by concealment of facts. There can be no doubt that if these facts are proved, there has been concealment, in the sense that no candidate can be permitted to make a representation which is false and thereby obtain an appointment. As far back as September, 1958 the petitioner was called upon to submit his explanation this point. Even then, he promptly replied by saying that he had not made any statement in his application of having passed the I.Sc. examination. Two years passed and nothing was said, and thereafter all on a sudden two charge-sheets were issued one after another. It appears that the original application is either missing or not being produced. All that has been produced is a so-called summary of candidates summoned for interview by the Railway Service Commission. So far on the petitioner was concerned, under the heading "educational qualification" it is stated-Inter I (not proved). Under the heading personality intelligence and general knowledge" the entry shows that the petitioner had got the highest number of marks amongst three candidates and there is a note (subject to production of his original certificate). This summary is signed by Mr. M. R. N. Moorthy and M. C. Pradhan, said to be the members of the Railway Service Commission, who interviewed the candidates. All that happened at the enquiry was that a clerk was called to prove these two signatures. From this it is argued that at the time that the summary was made, the original application of the petitioner must have been in the hands of the Railway Service Commission and it must have contained a

representation that the petitioner had passed the Intermediate examination in the first class. It is not disputed that this clerk was not a clerk in charge of making the summary and was not in charge at all when the summary was made and had no personal knowledge. The two signatories are alive and have not been called and no explanation has been given for not calling them. In the affidavit in opposition filed by Y. R. Rao, the Assistant Personal Officer, some unconvincing arguments have been put forward. First of all, he points out that the enquiry officer rightly relied upon the summary of the candidate prepared by the Railway Service Commission in the usual course of business. He says that some of the entries for example, the date of birth, name of the petitioner etc. were "admittedly correctly entered" and the summary contains the signatures of the members of the Commission. From this he deduces that the conclusion is a right conclusion, namely that the petitioner in his original application made a representation that he had passed the Intermediate examination in science. In my opinion, the charge has not been proved at all and that the evidence called is of no value. The real point to be proved was the content of a document and that has not been proved. By proving the two signatures, it cannot be inferred that the charge levelled against the petitioner has been proved. In my opinion, this defect appears on the face of the record. Quite apart from this, there has been a gross violation of the rules of natural justice. According to the rules, railway employees are not allowed to have lawyers but they can have defence counsel of their choice. But in this respect there are very severe qualification. The defence counsel must be an employee of the Railway or a member of the Union. Having asked the petitioner to procure a "defence counsel", he was promptly asked not to leave station. In my opinion, it may be that the petitioner might have asked for leave to go out of the station for the purpose of obtaining a "defence counsel", but he was not informed of this fact. A complaint is made that the petitioner had actually obtained a "defence counsel" from Kharagpur. To obtain a defence counsel is not an easy task. Railway employees are not always might bring themselves into conflict within the authorities. It is therefore not at all strange that the petitioner had to find a defence counsel from Kharagpur. But when he did procure a defence counsel, and asked that arrangements may be made for his attending the enquiry, no such arrangements were made and no time was given for making such arrangements. The enquiry was peremptorily fixed and adjourned only for a day. Regard being had to the fact that the only evidence adduced was really no evidence at all, the petitioner was greatly prejudiced by the absence of his defence counsel and I think that he acted wisely in not participating in the enquiry. It is true that the Railway authorities cannot issue a summons or subpoena, but it has now been firmly established that they must do everything in their power to assist the delinquent in this respect. Otherwise the trial is a machinery. That being so, I must

hold that the enquiry is vitiated because there has been a violation of the rules of natural justice, and as such the preliminary objection fails. It has established by now that where there has been a violation of the rules of natural justice, the omission to avail of the alternative legal remedy is not fatal and that this court has always the right to interfere by a high prerogative writ. So far as the third point of Mr. Chakravarty is concerned, it appears that the post of the Coal Manager, Adra, has been abolished and his place taken by the D.O.S., Adra, consequently there is nothing in this point.

The result is that this application succeeds and the rule must be made absolute and the order of dismissal of the petitioner as well as the departmental proceedings subsequent to the issue of the charge sheet and the explanation given thereto, must be quashed by a writ in the nature of certiorari and there will be writ in the nature of Mandamus directing the respondents not to give effect to the same. The respondents will however be entitled to continue the departmental proceedings if they are so minded from that stage. There will be no order as to costs.

*Rule must be made absolute no order as to costs.*

N. C. S.

#### APPELLATE CIVIL

*Before the Hon'ble Chief Justice and the Hon'ble  
Mr. Justice Debabrata Mookherjee.*

CHIEF COMMERCIAL SUPERINTENDENT, SOUTH  
EASTERN RAILWAY & ORS.

Vs.

SWADESH BHUSAN GHOSH & ORS.\*

Civil

1962

February, 14.

*Chief Commercial Superintendent, South Eastern Railway and another vs. Swadesh Bhushan Ghosh and others.*

*Constitution of India, Art. 311(2)—Reasonable opportunity to show cause against the proposed penalty—When adequate (Case laws reviewed) Rule 1725 of Railway Establishment Code—Power of revision and review of authorities specified in Rule 1725 (a)—Procedure in Rule 1725 (b) to be followed—Rule 1725, not ultra vires the constitution—Revision, when unreasonable.*

A case of removal of a railway servant from service comes within Article 311 (2) of the constitution of India. In order that opportunity to show cause against the proposed action may be regarded as a reasonable one, it is necessary that the civil servant should have the opportunity to say that he has not been guilty of any misconduct to merit any punishment at all and also that the particular punishment proposed to be given is much more drastic and severe than he deserves, whether opportunity afforded to a public servant in a particular case is reasonable must depend upon the circumstances of that case (case laws reviewed).

\* Appeal from original order No. 17 of 1961.

The authorities mentioned in Rule 1725(a) of the Railway Establishment Code are competent to revise suo moto or otherwise any order passed by an authority subordinate to them, and have also the power of reviewing an appellate order passed by them or their predecessors, on the two grounds specified therein. If the said authorities purport to enhance the penalty imposed on a Railway servant (otherwise than as the result of an appeal preferred to them), the railway servant concerned has to be informed about such intention, as also the reasons on which the enhancement is proposed, and has to be asked to show cause why fact enhanced penalty should not be imposed. The revising authority mentioned in Rule 1725 (a) can enhance the penalty provided the procedure prescribed in Rule 1725 (b) is followed.

Rule 1725 now here says that the reasonable opportunity contemplated in Article 311(2) of the constitution is not to be given when the penalty of dismissal, removal or reduction in rank is proposed to be imposed upon a Railway Servant. The Rule has to be construed in such a way as not to conflict with the constitution unless such reconciliation is not at all possible. Rule 1725 can be construed as being subject to the provisions of Article 311(2), and is as such not ultra vires the constitution.

It was unreasonable in the extreme to reopen the disciplinary proceeding after the lapse of a period of about one year and after the Railway Servant had been promoted to the post of Travelling Ticket Examiner, Grade "C".

The material facts will appear from the Judgment:—

Profulla Kumar Roy with Ajoy Kumar Basu—for the Appellant.

A. C. Bhabhra with Manas Nath Roy—for the Respondent No. 11.

The Judgment of the Court was as follows:—

**H. K. Bose, C.J.:**—This is an appeal from an order of Sinha, J. dated the 13th September, 1960 made in a writ application quashing an order of removal of the respondent No. 1 from service in South-Eastern Railway and directing the Railway authorities not to give effect to the said order of removal.

On 26th February, 1944 the respondent No. 1 Swadesh Bhusan Ghosh was appointed as a clerk in the then Bengal Nagpur Railway. At the end of 1949 the said respondent opted for the post of a Ticket Collector and was posted at Puri. After joining at Puri the said respondent lived with one Sm. Sarajubala Banerjee who was a childless widow and it is alleged that she took the said respondent in adoption in the year 1950 and since then he lived with Sm. Sarajubala as mother and son. At the time of the adoption there was a dependent widow aged about 40 years and a dependant boy aged about 20 years living with the said Sm. Sarajubala Debi, who used to treat them as her daughter and son and they were introduced to the respondent No. 1 as such by Sm. Sarajubala, and the respondent No. 1 also looked upon and considered them as his sister and brother and as members of a joint Hindu family.

in which he was living. In February 1954 the respondent No. 1 was married at Berhampore in the District of Murshidabad and in connection with the said marriage the respondent No. 1 on or about 16th January, 1954 applied for passes for the adoptive mother Sarajubala and the dependent brother. On 27th December, 1954 respondent No. 1 again applied for passes for the said adoptive mother and the dependent widow sister. It appears that acting on the basis of a police report the District Commercial Superintendent, South-Eastern Railway, Khurda Road, Puri, issued a charge-sheet against the respondent No. 1 on 4th October, 1956 whereby the respondent No. 1 was charged with intentionally cheating the railways earning by obtaining passes on false declaration and by misusing them, and the respondent No. 1 was asked to show cause why he should not be removed from service. It was further enquired by the said notice whether the respondent No. 1 desired to be heard in person or by a agent. The particulars of the charges are set out in Annexure 'A' to the petition. On the 24th October, 1956 the respondent No. 1 submitted his explanation to the said charge-sheet and set out therein the circumstances under which he made the applications for the Railway passes for the three persons whom he described as the mother, sister and brother. Thereafter an enquiry was held by the Assistant Commercial Superintendent under the direction of the—District Commercial Superintendent and the respondent No. 1 appeared at such enquiry. On 10th July, 1957 the District Commercial Superintendent, Khurda Road, wrote to the respondent No. 1 a letter, the relevant portion whereof is as follows:—

“ Your explanation to this office charge-sheet dated 4th October, 1956 is not considered satisfactory in view of the facts stated below :

You took passes for your dependent widowed sister and dependent brother though you had no brother and sister by natural and adoptive parents.

You are therefore held guilty of the offences and your privilege passes and Ticket orders for the years 1957 and 1958 are withheld.

Sd/- M. K. Gangopadhyaya.  
District Commercial Superintendent,  
Khurda Road.

Thereafter the respondent No. 1 continued to work in the service of the railway as before and on 15th March, 1958 he was promoted to the post of a Travelling Ticket Examiner—Grade C. On or about the 4th July, 1958 the Chief Commercial Superintendent issued a notice to show cause in the following terms :—

"After going through the charge-sheet dated 4-10-56 served on you, reply dated 24-10-56 thereto, the report of the one officer Enquiry Committee and the penalty imposed by the D.T.S., KUR, I am satisfied that the penalty imposed against you is not adequate. In view of the gravity of the offences, I have provisionally formed the opinion that you should be removed from service as a penalty as the charges framed in the charge-sheet dated 4th October, 1956 have been proved. A copy of the report of the Enquiry Committee together with my findings thereon is enclosed.

2. You are hereby given 7 clear days' time from the receipt hereof to show cause why the proposed penalty should not be inflicted on you. Any representation that you make in this connection will be taken into consideration before passing final orders.

3. \* \* \* \* \*

4. \* \* \* \* \*

Sd/- B. Majumdar  
Chief Commercial Superintendent."

The relevant portion of the findings arrived at by the Chief Commercial Superintendent on the report of the Enquiry Committee may be set out hereunder :—

"3. I regret in the circumstances that I am unable to agree with the findings of the Enquiry Committee and consider that the charges levelled against Sri Ghosh have been proved in that he obtained passes under false pretence, that is, by describing certain persons as his dependent widowed mother, dependent widowed sister and dependent brother, when they were not actually so."

On 14th July, 1958 the respondent No. 1 submitted a written explanation showing cause. In this statement the respondent No. 1 stated categorically that the so-called brother and sister for whom passes had been obtained did not actually travel on the passes and it is only the mother that had availed of the pass which was issued in her favour and the respondent No. 1 further offered to pay the actual fare for the journey covered by the passes and also pointed out that he had been for the last one year suffering the punishment which had been inflicted upon him by the District Commercial Superintendent on 10th July, 1957. Thereafter another enquiry was held and the Chief Commercial Superintendent on 14th August 1958—passed an order inter alia to following effect:—

After considering your reply dated 14th July, 1958 the show cause notice No. CCS/CONF: /17/L(D)/87 dated 4-7-58 I have decided that as you are guilty of obtaining passed on false declarations and misusing them, you are hereby removed from service as a disciplinary measure and the same will take effect from 14-8-58."

By this order the respondent No. 1 was also called upon to surrender the railway quarters and the railway property, if any is his possession.

Thereafter an appeal was preferred to the General Manager and certain further representations were made, but the General Manager on 16th April, 1959 made an order to the following effect:—

"I have gone through the papers on the subject carefully. It is an admitted and proved case of *passés* in favour of those not entitled to. I agree that removal from service is the correct penalty."

The respondent No. 1 thereafter moved this Court under Article 226 of the Constitution in June 1959 challenging the validity of the said orders of removal from service and Sinha, J. issued a Rule Nisi on the 23rd June, 1959. This Rule ultimately came up for hearing before Sinha J. who in course of hearing gave directions for filling of certain supplementary affidavits and after considering these supplementary affidavits and contentions raised before him, the learned Judge by his order dated 13th September, 1960 made the Rule absolute and quashed the order of removal dated 14th August, 1958 and the appellate orders. It is against this order of Sinha, J. that this present appeal has been preferred.

The principal point involved in this appeal is Whether proper or reasonable opportunity was given to the respondent No. 1 before the order imposing the penalty of removal from service was passed against the said respondent. Now there is no doubt that a case of removal from service comes within Article 311(2) of the Constitution of India and what kind of opportunity is to be given to a person in the employ of the Government is made clear in the decisions of the Judicial Committee and of the Supreme Court of India. In the case of *High Commissioner for India vs. I. M. Lall*(1) Lord Thankerton in construing sub-section (3) of section 240 of the Government of India Act, 1935 the wordings of which were practically similar to the wordings of clause (2) of Article 311 of the Constitution made the following observations:—

(1) A.I.R. (1948) P.C. 121.

"In the opinion of their Lordships, no action is proposed within the meaning of the sub-section until a definite conclusion has been come to on the charges, and the actual punishment to follow is provisionally determined on. Prior to that state, the charges are unproved and the suggested punishments are merely hypothetical. It is on that state being reached that the statute gives the civil servant the opportunity for which sub-section (3) makes provision. Their Lordships would only add that they see no difficulty in the statutory opportunity being reasonable afforded at more than one stage. If the civil servant has been through an enquiry under R. 55, it would not be reasonable that he should ask for a repetition of that stage, if duty carried out, but that would not exhaust his statutory right, and he would still be entitled to represent against the punishment proposed as the result of the findings of the enquiry."

As the Judicial Committee found in this case that the second opportunity to make representation against the proposed punishment of removal from service had not been given to Mr. Lall, the order of removal was set aside.

The Supreme Court in the case of *Khemchand vs. Union of India*(1) has approved of the interpretation put by the Privy Council upon sub-section (3) of section 240 of the Government of India Act, 1935 and has laid down that the reasonably opportunity to the civil servant as envisaged by Article 311(2) of the Constitution includes:—

"(a) An opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based ;

(b) An opportunity to defend himself by cross-examining the witness produced against him and by examining himself or any other witness in support of his defence ; and finally

(c) An opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the enquiry is over and after applying his mind to the gravity or otherwise of the charges proved against the Government servant tentatively proposes to inflict one of the three punishments and communicates the same to the Government servant."

It is clear that the Supreme Court was of the view that in order that opportunity to show cause against the proposed action may be regarded as a

(1) A.I.R. (1958) S.C. 300.

reasonable one, it is necessary that the civil servant should have the opportunity to say that he has not been guilty of any misconduct to merit any punishment at all and also that the particular punishment proposed to be given is much more drastic and severe than he deserves.

In the case of *Kapur Singh vs. Union of India*(1) the Supreme Court after quoting with approval certain passages from *Lall's case*(1) and *Khemchand's case*(2) upheld the order of the President of India by which the appellant who was a member of the Indian Civil Service was dismissed from service, relying on the evidence already recorded in the enquiry by the Enquiry Commissioner and without giving the appellant a further opportunity of an oral hearing. The Supreme Court negatived the contention of the appellant that he was entitled to an oral hearing before the President of India had passed the final order of dismissal with the following observations :—

"By the Constitution an opportunity of showing cause against the action proposed to be taken against a public servant is guaranteed and that opportunity must be a reasonable opportunity. Whether opportunity afforded to a public servant in a particular case is reasonable must depend upon the circumstances of that case. The enquiry in this case was held by the Enquiry Commissioner who occupied the high office of Chief Justice of the East Punjab High Court. The appellant himself examined 82 witnesses and produced a large body of documentary evidence and submitted an argumentative defence which covers 321 printed pages. An opportunity of making an oral representation not being in our view a necessary postulate of an opportunity of showing cause within the meaning of Article 311 of the Constitution, the plea that the appellant was deprived of the constitutional protection of that Article because he was not given an oral hearing by the President cannot be sustained."

In a decision of the Allahabad High Court reported in *Allafur Rahaman vs. Collector of Central Excise, Allahabad*(3) to which reference has been made by the learned Advocate for the appellant, Bhargava J. after referring to the Supreme Court decision of *F. N. Roy vs. Collector of Custom*(4) and certain other decision also pointed out that in the case before him an absence of an oral enquiry did not vitiate the proceeding.

In the case before us the Chief Commercial Superintendent who purported to reopen the question of punishment and proposed to impose the penalty

(1) A.I.R. (1960) S.C. 493.

(2) A.I.R. (1948) P.C. 121.

(3) A.I.R. (1960) All. E.R. 551.

(4) A.I.R. (1957) S.C. 648.

of removal on the respondent No. 1 had by his notice to show cause dated 4th July, 1958 given an opportunity to the respondent No. 1 to make representations against the punishment of removal proposed to be inflicted on him. The respondent No. 1 did make such representation in writing. He did not ask for any personal or oral hearing. He had stated in his explanation all that he had to say in the matter. Prior to that he had participated in the enquiry which was held by the Assistant Commercial Superintendent in which evidence of witnesses has been taken. The respondent No. 1 had been given the fullest opportunity of adducing oral evidence on his behalf and he had tendered certain witnesses for examination and their evidence had been recorded by the Enquiry Committee. In the circumstances we find it difficult to hold that reasonable opportunity as contemplated by Article 311(2) of the Constitution was not given to the respondent No. 1. It now remains to examine the further contention that has been raised on behalf of the respondent No. 1 that the revision proceeding which was initiated by the Chief Commercial Superintendent by his notice to show cause dated 4th July, 1958 purporting to act under rule 1725 of the Railway Establishment Code, Vol. 1 (Chapter XVII—Conduct and Discipline Rules) was in violation of the terms of the said rule or is one which is not warranted by the provisions of the said rule. It has been argued by Mr. Bhabra, the learned Counsel for the respondent No. 1 that inasmuch as the Chief Commercial Superintendent disagreed with the findings of the Enquiry Committee and with the conclusion of the District Commercial Superintendent and arrived at an independent finding that the respondent No. 1 had also been guilty of the charge of obtaining a pass for the adoptive mother on false pretence and that the respondent No. 1 had also been guilty of the charge of missing the passes which had been obtained for the widowed sister and brother, a further hearing should have been given in this revision proceeding in order to enable the respondent No. 1 to controvert the correctness of these additional findings which had been made by the Chief Commercial Superintendent and as that was not done the provisions of Article 311(2) of the Constitution must be held to have been contravened in this case.

“1725. (a) The Railway Board, a General Manager and any officer not below the rank of Deputy Head of Department, a Divisional Superintendent, specified in this behalf by the General Manager, shall have the power, on their/his own motion or otherwise to revise any order passed by an authority subordinate to them/him and shall also have the power to reconsider an earlier order passed on an appeal by them/him or by a predecessor, if on a subsequent date either fresh light is thrown upon the case or by his subsequent conduct the employee has established a case for mitigation of the penalty imposed.

(b) When an authority referred to in (a) above, proposes to enhance the penalty imposed on railway servant otherwise than as the result of an appeal preferred to him, he shall communicate his intention to the railway servant concerned, with the reasons there for, and call upon him to show cause as to why the enhanced penalty should not be imposed. After considering the reply of the railway servant to this communication he shall pass such orders as he thinks fit."

It is clear from the provisions of clause (a) of the said Rule that the authorities mentioned in the said clause (a) are competent to revise suo moto or otherwise any order passed by an authority subordinate to them and they have also the power of reviewing an appellate order passed by them or their predecessor, on the two grounds specified in clause (a). See also Altafut Rahman case(1). If the said authorities propose to enhance the penalty imposed on a railway servant (otherwise than as the result of an appeal preferred to them) the railway servant concerned has to be informed about such intention and the reasons on which the enhancement is proposed have also to be communicated to him and he has to be asked to show cause why the enhanced penalty should not be imposed. The revising authority mentioned in clause (a) can enhance the penalty provided the procedure prescribed in clause (b) is followed. Rule 1725 nowhere says that the reasonable opportunity contemplated in Article 311(2) of the Constitution is not to be given when the penalty of dismissal, removal or reduction in rank is proposed to be imposed upon a railway servant. The Rule has to be construed in such a way as not to conflict with the Constitution unless such reconciliation is not at all possible. In my view Rule 1725 is to be construed as being subject to the provisions of Article 311(2) of the Constitution and it cannot be declared as ultra vires the Constitution.

Now in the present case the Chief Commercial Superintendent had forwarded to the respondent No. 1 the Report of the Enquiry Committee and his own findings containing the reasons why he proposed to enhance the penalty and why he disagreed with the findings of the Enquiry Committee; and the respondent No. 1 was asked to show cause. The respondent No. 1 showed cause by submitting an explanation in writing and no personal hearing was asked for. There can be no question that the power of the revising authority is not confined or limited to the imposition of penalty solely on the basis of the Enquiry Officer's findings which are adverse to the railway servant. In determining the question whether the penalty should be enhanced or not it is certainly open to the revising authority to come to his own conclusions and findings on the materials which were before the Enquiry Officer. So long as the revising authority has not taken into consideration extraneous materials

(1) A.I.R. (1960) All. E.R. 164.

or facts which the Railway servant had no opportunity of controverting it cannot be said that the principles of natural justice have been violated. If the report and findings of the Enquiry Officer are stamped with a finality which the revising authority cannot question, then the very object of revision is frustrated. The Assistant Commercial Superintendent's finding is that the fact that the brother and the sister did not travel on the passes had not been proved, but he found that the adoption had been proved. The District Commercial Superintendent did not accept it. His view was that all the charges had been proved and he made that clear to the respondent No. 1, and asked him to show cause. So the case of *Siban Lal Sexena*(1) relied on by Mr. Bhabra is of no assistance to his client. It is true that it was unreasonable in the extreme to reopen the disciplinary proceeding after the lapse of a period of about one year and after the respondent No. 1 had been promoted to the post of a Travelling Ticket Examiner Grade 'C' but it is possible that the matter did not come to the notice of the Chief Commercial Superintendent for some reason or other, before the 3rd July, 1958 and this is why he could not take earlier action in the matter. The District Commercial Superintendent took a lenient view of the matter and inflicted a minor punishment and for such punishment a second opportunity was not necessary. The Chief Commercial Superintendent took a stricter view of the conduct of the respondent No. 1, and of the merits of his case, and imposed one of the major punishments after giving the Railway Officer a second opportunity as contemplated by Article 311(2) of the Constitution and Rule 1725 of the Railway Establishment Code. There had already been a full enquiry into the charges in which the respondent No. 1 had participated and therefore according to the Privy Council decision in *Lall's case*(2) he was not entitled to an repetition of that enquiry in the revision proceeding. The appellate authority also after carefully going through the records upheld the order of the Chief Commercial Superintendent. The appellate authority was not bound to give the respondent any personal hearing at that stage. In my view the impugned orders of removal are not bad on the ground that reasonable opportunity as envisaged by the Constitution was not given to the respondent No. 1.

The other point raised on behalf of the respondent No. 1 is that he being an employee under the Ex-Bengal Nagpur Railway his service could not be terminated except by the General Manager. Reliance is placed on a Railway Memorandum or Circular referred to in paragraph 6 of the Supplementary affidavit affirmed on 3rd June, 1960 which contains a directive that Removal or dismissal of staff of the Ex-Bengal Nagpur Railway Company can only be ordered by the General Manager. The answer to this contention is that that this directive is applicable only to the case of employees who were in the

(1) (1954) S.C. App. Case 53.

(2) A.I.R. (1948) P.C. 121.

permanent staff of the Ex-Bengal Nagpur Railway at the time the Company managed Railway was taken over by the Government on 30th September 1944, and as the respondent No. 1 was not a permanent employee and did not and could not enter into any service agreement he cannot avail himself of the directive in question. The said directive applies only to the case of those who were substantive holders of posts on or before the 30th September, 1944 and to whom terms of reemployment were offered by the General Manager of the B. N. Railway (see paragraphs 4, 5 & 6 of the affidavit of Golokendu Ghose affirmed on 22nd June, 1960 and the documents in annexure 'A' to the said affidavit. It will thus appear that there is no substance in this contention of the respondent No. 1.

In my view the order of Sinha J. dated the 13th September, 1960 is not right. This appeal is accordingly allowed and the judgment and order of Sinha, J. are set aside. In the circumstances of this case we make no order as to costs.

Before parting with this case we should like to observe that in view of the fact that the respondent No. 1 had already suffered to a certain extent the punishment imposed by the District Commercial Superintendent and that he was considered fit for promotion in March 1958 and that he had been in the service of the railways for about 14 years before the order for removal was passed, the authorities concerned should reconsider the case of the respondent No. 1 favourable and should give him a chance of continuing in service, if possible.

*Appeal allowed.*

**Debabrata Mookerjee, J.:**—I agree.

N. C. S.

## CIVIL REVISION

*Before the Hon'ble Mr Justice Mookerjee and the  
Hon'ble Mr. Justice Chatterjee.*

Civil  
1961

ALOKA. GHOSE

November, 28.

Vs.

INSPECTOR GENERAL OF POLICE, WEST BENGAL & ORS.

*West Bengal Premises Tenancy Act, 1956 (West Bengal Act XII of 1956). Section 17—Applications under, if may be deferred till the hearing of the Suit—Section 17(3)—Application under procedure to be adopted by Court in dealing with.*

\* Civil Revision Case No. 1881 of 1961.

Applications under Section 17 of the West Bengal Premises Tenancy Act, 1956, are meant to be disposed of at a preliminary stage of the suit; otherwise their very purpose would be frustrated. Even if it involves consideration of a very material defence to the suit, that is not necessarily a ground for deferring the hearing of these applications until the hearing of the suit.

The Court may, at the stage of the Section 17(3) application, decide the question of the existence or non-existence of the relationship of landlord and tenant between the plaintiff and the defendant only prima facie and for the purposes of the said proceeding only, leaving it open for a final decision at the time be the hearing of the suit. The Court may also take up the issue upon that question in the suit along with the application under Section 17(3), and decide the two together fully and finally for the purpose of the suit also.

The material facts will appear from the Judgment:—

Mukunda Behari Mullick, Mohendra Nath Ghosh with Rabindra Nath Mitra—for the *Petitioner*.

Nani Coomer Chakrabarty with Arun Kumar Janah—for the *Opposite Parties*.

The Judgment of the Court was as follows:—

**P. N. Mookerjee, J.:**—This Rule is directed against an order of the learned subordinate judge, directing, inter alia, that the plaintiffs application under Section 17(3) of the West Bengal Premises Tenancy Act, 1956, for an order under the said sub-section of the aforesaid section be taken up, in the circumstances of this case, at the time of hearing of the suit.

The suit in question is a suit for ejectment. The plaintiffs above application was made on allegations of default in the payment of rent on the part of the defendant.

The defence, inter alia was that there was no relationship of the landlord and tenant between the parties and the suit was not maintainable and a further point was specifically raised that the premises was a requisitioned premises and the requisition was still continuing.

On behalf of the plaintiff petitioner, Mr. Mullick has pressed before us that the application under section 17(3) cannot be postponed until the hearing of the suit simply because a defence on the above line has been raised. We are inclined to accept this submission of the petitioner. Applications under section 17 of the above Act are meant to be disposed of at a preliminary stage of the suit; otherwise their very purpose would be frustrated. Even if it involves consideration of a very material defence to the suit, that is not necessarily a ground for deferring the hearing of the application until the hearing of the suit. It may be that the Court, at the stage of the section 17(3) application, will

decide the above question, which forms a material issue in the suit itself, only prima facie and for purposes of the said proceeding, leaving it open for a final decision at the time of hearing of the suit. It may also be that the Court may take up the issue upon that question along with the application under section 17(3) and decide the two together fully so that the decision on that issue will be final for purposes of the suit also. But there is no justification for deferring consideration of the application under section 17(3) simply because of the above defence or circumstances until the trial of the suit.

In the above view, we would direct the learned Subordinate Judge to take up the plaintiffs application under section 17(3) of the above Act, either with or without the issue on the above point as to the maintainability of the suit on the ground of absence of relationship of landlord and tenant between the parties and the alleged continuance of the requisition.

We may add here that Mr. Chakravarty, appearing on behalf of the defendants opposite parties, drew our attention to section 1, sub-section (3) proviso, 2 of the above Act and contended that the said Act would not apply to the present proceeding. We need only note that there is dispute between the parties as to whether the alleged requisition is continuing but, in any event, if this point is raised before the learned Subordinate Judge, he will deal with it and decide it in accordance with law at the time of hearing of the section 17(3) application. If the defendants succeed in their above point and the above Act is held not apply to the instant case, obviously, the plaintiff's aforesaid application will have to be dismissed. But that is a matter for the learned Subordinate Judge to consider and we are expressing no opinion on the point.

The Rule is made absolute accordingly, the order of the learned Subordinate Judge is set aside and the case is remitted to him for consideration of the matter under section 17(3) in accordance with law in the light of the observations, made hereinbefore.

Costs of this Rule will abide the final result of the aforesaid application.

**Chatterjee, J.:**—I agree.

*Rule is made absolute.*

N. C. S.

## ORIGINAL CIVIL

*Before the Hon'ble Mr. Justice D. N. Sinha.*

Civil

1962

January, 4.

GOUR CHANDRA SAHA

Vs.

THE STATE OF WEST BENGAL &amp; ORS.\*

*Bengal Excise Act, 1909 (Bengal Act V of 1909)—Grant of Excise licence—Selection of candidate—Section 8(3)—Revision—Effect of—Expiry of period of licence—Remedy under Act 226 of the constitution of India—Scope of.*

When one of the candidate for an Excise Shop is selected by the Additional District Magistrate, the applications of other candidates are thereby rejected, under the Bengal Excise Act, 1909.

Provisional licenses are granted because of the pendency of the applications for settlement of an Excise Shop under the Act.

Excise licenses are issued for a period under the Act. Appellate and revisional orders in respect of an order of settlement of an Excise Shop, or of issue of a license for such a shop, also relate to such period. On expiry of such period, all these orders spend their force. It would be futile to quash a license which is no longer effective.

On the expiry of the period of a license, a fresh license had to be granted in accordance with the law.

The material facts will appear from the Judgment:—

The Judgment of the Court was as follows:—

**Sinha, J.:**—The application is in respect of the excise licence of a country spirit shop at Behala for the year 1957-58. Originally a licence had been granted to one Amarendra Nath Chatterjee. In 1957, Chatterjee died and a temporary licence was granted to Santibala Chatterjee his widow, and Sukumar Bhattacharjee, her brother, who was a registered salesman of the shop. They applied for settlement of the shop. There were also other applicants for the shop, including the petitioner. All these applications were considered by the Additional District Magistrate, who, by his order dated the 14th of May, 1958 selected Santibala and Sukumar for issuing the licence. This, of course, meant that the applications of others, including the petitioners were rejected. Three of the applicants preferred appeals against the order of the Additional District Magistrate, before the Excise Commissioner. The petitioner did not appeal. On the 20th of September, 1958 the Excise Commissioner set aside the order of the Additional District Magistrate and the shop with one Tarapada Trivedi. Against this order, Santibala and Sukumar as also Amulyadhan Mitra preferred appeals to the Board of Revenue. On the 24th of June, 1959 the Board of Revenue confirmed the order of the Excise Commissioner. Then in July, 1959

\* Matter No. 31 of 1961.

revision petitions were preferred before the State of West Bengal which is the appropriate revisional authority under Section 8(3) of the Bengal Excise Act, 1909. The petitioner in this case, who had not appealed, made an application for revision. These revision petitions were considered by the Minister of Excise and he considered Amulyadhan Mitra to be the proper person to get the Licence. Against this order, several parties have come up to this Court under Article 226 of the Constitution. Because of the pendency of these applications and the rules issued thereunder and the stay orders made therein, the shop appears to have continued to be in the possession of Santibala Chatterjee Sukumar Bhattacharjee, who were granted from time to time provisional licences, the last of which appears to be valid upto March, 1962.

Many complicated questions have been raised in these applications namely, as to the jurisdiction of the Minister of Excise to hear matters in revision under Section 8(3) as also various other points. One of such applications I have already dealt with to-day, being *Tarapada Trivedi vs. The State of West Bengal & Anr.*(1). There the petitioner did not press the application because the period for which the licence had been issued, namely 1957-58 has long ago expired. In my opinion, this application has also become infructuous, because the period for which the licence was given to Amulyadhan Mitra or any of the other applicants for licence, has long ago expired. The period of dispute is 1957-58 and now we are in 1962. The provisional licences were only granted because of the pendency of these applications. Now, the relevant period having expired, fresh licences will have to be granted in accordance with law and the orders already made in respect of 1957-58, original, appellate or revisional—have spent themselves, and, therefore, I do not see why the complicated questions should be decided in these applications at the present moment. It would be futile to quash a licence which is no longer effective.

I therefore discharge this Rule but without prejudice to the petitioner's right to apply for a fresh licence and to take proceedings in respect thereof as he may be advised. With regard to the provisional licence the authorities may take such steps as they are entitled to do under the Act and the Rules. The interim order is vacated. There will be no order as to costs.

*Rule discharged interim order vacated  
no order as to costs.*

N. C. S.

(1) C. R. 2868 of 1960 unreported case.

## APPELLATE CIVIL

*Before the Hon'ble Chief Justice and the Hon'ble*

Civil

*Mr. Justice Surajit Chandra Lahiri.*

1955

ANNADA PROSAD GUIN

March, 3.

Vs.

DISTRICT MAGISTRATE AND COLLECTOR OF MUSHIDABAD.\*

*Bengal Village Self-Government Act, 1909 (Bengal Act V of 1909), S. 101(2) Cls. (a) & (b)—  
R. 2, made under it intra vires—Devison of Union into electoral wards, if permissible:  
—Art. 226 of the Constitution, scope of.*

In order that an election may be held and members elected at such election, there must be constituencies, although there is nothing inherently impossible in the whole area of a Union under the Bengal Village Self-Government Act, 1919, constituting a single constituency.

The division of the whole area of a Union into electoral wards contemplated by Rule 2 of the Election Rules made under Notification No. L.S.G. 3R/46/49 dated 4 April 1952, has relation to prescribing the "manner" of election mentioned in clauses (a) and (b) of Section 101(2) of the Act. Therefore, Rule 2 is not ultra vires in the Act.

Rule 2 is entire within the rule-making powers of the Provincial Government as contained in Section 101(2)(a), and there is no element of delegation of power in it at all.

In application under Article 226 of the Constitution, a party cannot have a relief which he never asked for and that on a case which he never made in the course of the actual proceedings before his coming to the Court.

The Material facts will appear from the judgment :—

Priti Kumar Barman with

Manan Kumar Ghose—for the Appellant

Anil Kumar Das Gupta with

Smriti Kumar Roy Chaudhury—for the Respondent

The Judgment of the Court was as follows :—

**Chakravarti G. J.** This is an appeal from a judgment and order of Sinha J., dated the 28th of July 1953, by which an application made by the appellants under article 226 of the Constitution of India was dismissed.

The appellants who are eight in number challenged an order by which a Union called the Mohulla Union was divided into three electoral wards. Of the eight appellants, four, that is, Nos. 1, 2, 5 and 7 were members of the old Union Board, of whom two have been elected at an election subsequently held.

The remaining four are residents of the locality and therefore interested in the affairs of the Union.

\* F.A. 340 of 1953.

The facts briefly stated, are as follows. On the 20th of April, 1949, a notice signed by the Circle Officer of the area was issued to the President of the Mohulla Union Board and he was asked to submit his proposals as to how best the Union could be divided into three wards of a reasonably equal size and how many members could properly be elected from each. No notice appears to have been taken of that communication. Subsequently on the 8th of April, 1952, a similar notice, signed by the same officer, was sent to the President. This time the language was more emphatic and it was stated that for the purposes of the ensuing general election, the Union would have to be divided into three wards and therefore the Union Board was being invited to submit its proposal for the contemplated division in the form set out in the notice itself. The case of the appellants is that on receipt of that notice, the Board deliberated on the matter and accepted a resolution on the 13th or 14th of April, 1952, by which a certain manner of dividing the union into three wards was decided on. It is said that a copy of the relevant resolution was sent to the Circle Officer. On the 5th of September, 1952, the Circle Officer submitted his proposal for the division of the Union into wards to the District Magistrate through the Sub Divisional officer. Prior thereto, he claims to have conducted some kind of an enquiry and also considered a representation submitted to him by some people of the locality, including the Secretary of the Mohulla Congress Committee. The proposal submitted to the District Magistrate is said to have been approved by him on the 22nd of September, 1952. Thereafter, a copy of the proposal was sent to the Union Board, which also received a notice that the election would be held on the 13th of March, 1953. After that notice had received a petition signed by a fairly large number of persons, including the appellants before us and dated the 26th of December, 1952, was submitted to the District Magistrate and by that petition objection was taken to the division of the Union as purported to have been made. As no information was received as to the rate of that petition, a second petition, dated the 11th of February 1953 was submitted for a reconsideration of the matter. Both these petitions were rejected. Thereafter the appellants moved this court under Article 226 of the constitution and obtained a Rule on the 9th of March, 1953. On the 28th of July, 1953, the Rule was discharged.

It appears that two points were taken before Sinha, J. In the first place, it was contended that the division of the Union into electoral wards was wholly bad in law, inasmuch as the Bengal village Self Government Act, 1919 contained no provision for such division and inasmuch as Rule 2 of the Rules framed under clauses (a) and (b) of sub section 2 of Section 101 of the Act, under which the division was claimed to have been made, was wholly ultra vires the Act. It was contended, in the second place, that assuming that Rule 2 was a good Rule, it left the decision as to whether a Union should be divided

into wards or not and if divided, what the number of the wards shall be to the District Magistrate, but in the present case the District Magistrate had decided nothing and has merely appended his signature to certain ready made proposals, submitted to him by his subordinate officers.

Sinha, J. found no merit at all in the second contention. He held that the exigencies of administration required that many of the duties allotted by statutes to superior officers should be performed at the outset by subordinates and that unless the groundwork was done by officers in the lower grades, it would be impossible to carry out any project or perform any administrative duty at all. In the learned judge's view, the date of the case made it sufficiently clear that the District Magistrate had done amounted to his making a decision within the meaning of the Rule. As regards the first point, the learned Judge found it to be of some difficulty because Section 101 which continued the Rule making power of the Government spoke only of "the manner of election" and the learned Judge thought that however wide that expression might be, to construe it as covering a division of a Union into wards would be to put a severe strain on the language. Ultimately, however, the learned Judge did not give effect to the doubt felt by him, because he felt pressed by the consideration that the Act had been in force since 1919 and although it had become one of the commonest things to divide Unions into wards, it had never been contended that no power to make any such division existed under the Act at all. The expression 'manner of election' the learned Judge thought was capable of a wide as well as a narrow meaning and therefore he preferred to adopt the wide meaning which had so long been accepted.

I need not make any serious reference to a third point also raised before the learned Judge and disposed of by him with the brief comment that it was of little substance. The point was that even assuming that the Government had power to divide a Union into wards, such power could not be delegated to the District Magistrate and that the true effect of Rule 2 was that the Government had made a delegation.

Having been taken through the materials in the paper book at some length heard the parties, I must say that we did not at all feel happy as regards the manner in which the respondent had proceeded in the case. This however bears only upon the point that the District Magistrate never decided that Union had to be divided into wards and that only his subordinate had done so. Before dealing with the point, I might consider the other point which Sinha, J. found to be one of the difficulty.

The point, as I have said, is that the Bengal Village Self Government Act, 1919, only provides that the Districts or parts of districts may be divided into convenient local areas and each such area may be declared to be Union for the purposes of the Act. In terms, the Act does not say anywhere that an area, once declared to be a Union can be further sub divided for any purpose. So far as the broad language of the statute goes, it certainly seems to treat each Union as a single unit, but the Act also provides for election and among the rule making power which it has conferred on the provincial Government by section 101 is included the power to make rules 'determining the manner and time of election of members of union boards.' We are concerned with only the manner and may leave aside the time. If there be any division of a Union into wards in the contemplation of the Act at all, it must be found in the provision which I have just read.

The statute, therefore, speaks of making rules for the manner of election of members. How are members elected at any election. It is trite knowledge that in order that an election may be held and members elected at such an election, there must be constituencies. There is certainly nothing inherently impossible in the whole area of a Union constituting a single constituency, but the point is not whether the whole area of a Union can be a constituency for the purposes of an election, but whether the division of the total area of a Union into electoral wards can be said to have any relation to prescribing the manner of an election. In my opinion, such relation clearly exists. The division contemplated by Rule 2 of the Rules framed clause (a) and (b) of section 101(2) is not a division for all purposes and the total area of a Union is not divided under that Rule into separate self contained wards in the same manner and with the same effect as the area of a municipality. There is no question of there being separate wards, each provided with the same set of amenities such for example as a charitable dispensary a primary school, a tube well and vaccination centre and institutions of that kind. The division into wards contemplated by the Rule is wholly and solely for the purpose of furnishing constituencies for Union Board elections and consists only in dividing the population of the Union into separate groups, giving to each the right to elect a specified number of members. The so called division into wards is therefore nothing more or less than grouping of the inhabitants into different sections in order that they may function as distinct and separate constituencies for the purpose of electing the members of the Union Board. It appears to me to be perfectly clear that such division of a Union into wards for such purpose amounts to prescribing the manner of election of members. I am thus clearly of opinion that Rule 2 cannot be said to be ultra vires the Act.

I might refer here in passing before I take up the point involving questions of act, to the third point urged by the appellants before Sinha, J. That point

it will be remembered was that in so far as a Rule 2 embodied a delegation of the powers of the Government to the District Magistrate, it was a Rule bad in law. I do not find any delegation of any kind in Rule 2. The Rule reads as follows:

"The District Magistrate shall decide in what manner each Union shall be divided into electoral wards and the numbers of members to be returned for each of such wards: Provided that the District Magistrate may, if he thinks convenient, decide that a union shall consist of one electoral ward only."

As a matter of language, it is clear that when the Rule says that the District Magistrate shall decide in what manner each Union shall be divided into electoral wards, it assumes that the Union will be so divided and leaves to the District Magistrate only the manner of the division. Read with proviso the Rule appears to me to mean that normally, a Union shall be divided into a convenient number of electoral wards but the District Magistrate may decide in a particular case that no such division is necessary and further that where the District Magistrate does not so decide, it will be for him to decide in what particular manner the division into wards shall be made. In my view, Rule 2 is entirely within the rule making powers of the Provincial Government, as contained in section 101(2) (a) and there is no element of delegation in it at all.

I have now cleared the ground for approaching the principal question in the case, which is that assuming everything against the appellants, they are still entitled to succeed on the facts inasmuch as the District Magistrate, who is the authority nominated by the Rule to decide whether a Union shall be divided or not and if divided what the manner of the division shall be, had not applied his mind in this case of any stage at all and the real fact was that everything had been done by subordinates with the name of the District Magistrate kept in front. I cannot say that there is not some legitimate ground for criticism of the manner in which the officials concerned proceeded. The very first notice, to which I referred a few moments ago, refers to the division of the Union into three wards as a settled plan and it is a notice, not signed by the District Magistrate or on his behalf but by the Circle Officer. There is nothing to show that it was the District Magistrate's decision that the Union should be divided and that the number of wards should be there. I agree entirely with the learned trial Judge that the subsequent field work was properly done by the Circle Officer and to a certain extent by the Sub divisional officer and that it was only they who could be, and could be expected to do that kind of work. But when one reaches the stage of final decision,

one finds again a rather curious state of the facts. On the affidavit of the circle officer, which the District Magistrate has supported by an affidavit of his own what happened was that proposals for the division of as many as thirty-one Unions, submitted by this particular Circle Officer and proposals for the division of other Unions submitted by another Circle officer were all placed before the District Magistrate in a lump with a top sheet upon which it was stated that the papers below contained the proposals of the Circle officers, which might be approved. That note was by the officer in charge of the District Chowkidari Department who appears to function, in regard at least to Union Board matters something like the Seristadar of the District Magistrate. On that top sheet and below the collective note, if I may use that expression, of the officer in charge of the District Chowkidari Department, occurs the single word 'yes' and below that work the word 'there is something like a tick mark which is said to be the signature of the District Magistrate. Neither the note of the Officer in Charge of the District Chowkidari Department nor the alleged signature of the District Magistrate bears any date, so that there is no means of knowing what time elapsed between the mass submission of the proposals and the inscription by the District Magistrate of his affirmation. Giving the maximum value to what appears from the affidavits of the respondents, it would appear that so far as the District Magistrate was concerned, he came to know of the proposals for the first time when they were submitted to him by the officer in charge of the District Chowkidari Department and having the proposals for many more than thirty Union Boards before him, all submitted in a lump with a top sheet containing a covering note, he discharged his duty of deciding whether those numerous Unions should be divided into different wards and whether they should be divided in the manner proposed by inscribing the single word 'yes' on the small sheet of paper placed on the top of the mass. It would seem that the nature of the act performed by the District Magistrate was correctly described by the circle officer in his affidavit perhaps unconsciously, when he said that the District Magistrate had put his signature, approving all the proposals. The District Magistrate has, however, sworn that he considered the delimitation proposals of the Circle officers, including the present one, and he approved the proposals. Although from the facts which I have recited, appearances are not favourable to the contention of the respondents, we shall not be justified in disregarding the statement affirmed by the District Magistrate himself. However unhappy one may feel that matters in regard to which the decision has been left to the District Magistrate should be dealt within what appears to be a very summary manner, the court must, in the absence of any other materials, accept the statement made by a responsible officer who has pleaded his oath, although it may be left guessing what manner of a 'decision' it was. It will be remembered that the initial notice which stated that the Union would have to be divided into three wards, had not been

issued by the District Magistrate had even tentatively decided that the Union should be divided into three wards and thereafter left the actual division to be worked out by the subordinates and then approved their proposals regarding the manner of the distribution of the Union area, little could be said in criticism of the procedure followed by him. As matters stand, he was nowhere on the scene, till the proposal regarding this particular Union Board, along with proposals regarding a multitude of other Union Boards, was placed before him and he had occasion to exercise his mind only at that stage during whatever he did in that behalf in a wholesale manner and not even strictly speaking, deciding anything but only approving of the proposals.

These considerations, however, do not avail the appellants. It will be remembered that when the Union Board received the notice, its reaction was not to raise an objection that the Union could not be divided into wards, nor to say that the division should not be into three wards, but should be divided into a larger or a smaller number. What the Union Board did was that itself submitted certain proposals for the division of the Union into three wards. It would thus appear that the appellants never raised the point that the area of a Union could not in law be divided into wards, nor the point that this particular Union should not be divided, nor even the point that the division should not be into three wards. In fact, the members of the Board themselves made a proposal for a division of the Union and for a division into three wards in the manner proposed by them. In those circumstances, it seems to me that it is not open to the appellants in application under Article 226 of the constitution, to seek to question the order of division on the grounds that no such division is contemplated in law or on the ground—that the division should not have been into three wards or on the ground that the District Magistrate had not applied his mind to the question of the number of wards into which the Union should be divided. In an application for a high prerogative writ, a party cannot have a relief which he had never asked for and that on a case which he had never made in the course of the actual proceedings before his coming to the court. What remains therefore, is only the question of the actual distribution of the Union in the manner done by the Respondents. So far as that distribution is concerned, Mr. Das Gupta contended that the order of the 22nd of December, 1952, when the division was finally approved, must be taken as final and having regard to the fact that there is an affidavit by the District Magistrate, which, be accepted, Mr. Das Gupta's contention should, in my view, prevail. Since the appellants are not entitled in my view to raise the question of the legality of any division of a Union at all nor the question of the divisibility of the present Union or its divisibility into three wards, the area of the alleged impropriety on the part of the respondents which is questionable in those proceedings shrinks to a con-

siderable degree. It narrows down to the decision as to the actual composition of the three wards into which the Union had been divided. I have less difficulty in holding that so far as that single matter is concerned, the approval of the District Magistrate may be taken to be a decision. Apart from that, the fact of the matter seems to be that the respondents accepted the proposals made by the local District Congress Committee, whereas the appellants proposed a different manner of division. The subject matter of the contest is therefore not any question of principle, but a question of the merits of the division actually made—a matter hardly to be agitated on an application under Article 226 of the constitution.

One other matter remains to be noticed. It will be recalled that after the division of the Union as proposed by the Circle Officer and assented to by the District Magistrate, had been announced, two petitions of objection were submitted to the District Magistrate by certain people of the locality. According to the District Magistrate's own affidavit, both of them were sent by him to the Sub Divisional officer, the earlier one for 'disposal' and the later one for 'report'. In fact, the second petition also was disposed of by the Sub Divisional officer as, to adopt the District Magistrate's own language, 'the D. M. in charge'. How in the face of Rule 45 of the Rules which forbids delegation of the District Magistrate's functions under Rule 2, the first petition could have been sent to the sub Divisional officer for disposal is not intelligible, unless it be assumed that the Rule was not known to the District Magistrate or was forgotten by him. Mr. Das Gupta made no attempt to support the action of the District Magistrate in regard to the first petition and conceded that the disposal by the Sub Divisional officer was wholly contrary to law. What he still contended was that since the two petitions asked for the same relief on that same grounds and since the second of them was disposed of by the Sub Divisional officer, acting as District Magistrate, the Second petition at least was considered and disposed of by the proper authority and therefore, in the result no illegality affecting the ultimate decision had occurred. On that contention being advanced, we wanted to know what the phrase 'D.M. in charge' meant and how the Sub Divisional Officer had come to act as the District Magistrate. After making the necessary enquiries, Mr. Das Gupta informed us that the District Magistrate had gone on leave during the relevant period and left a note that his work would be carried on by the Sub Divisional officer. Asked whether that could make the Sub Divisional officer a District Magistrate, Mr. Das Gupta frankly conceded that it could not and be admitted without any further argument that neither of the petitions had been considered and disposed of by the proper authority contemplated by the law. He contended, however, that the irregularity, patent and indefensible as it was, could not be said to have affected the validity of the division of the Union,

as made, because if the approval by the District Magistrate of the proposals of the Sub Divisional officer was his 'decision', a valid division of the Union had already taken place when that approval was given and the disposal of the subsequent petitions by an authority, having no jurisdiction in the matter, could not invalidate the division. Much as one must regret the disregard of the rules in regard to the disposal of the petitions, I feel pressed to assent to Mr. Das Gupta's argument. If the rules had provided for a review of the District Magistrate's decision, it would have to be held that where there was an application for a review, there could be no final decision till the application was disposed of and therefore if such application was disposed of by an authority not contemplated by the rules, there could be no valid decision or division of the Union. But the Rules in the present case do not provide for any review and therefore once a division has been made by the decision of the District Magistrate that division must remain valid, although subsequent petitions for a reconsideration of the division are not considered and disposed of by him and although he was the only authority who could and ought to have disposed of them.

It must however be admitted that by requiring the District Magistrate to decide for himself in the case of each one of the numerous Unions within his jurisdiction whether it should be divided into electoral wards, if so, into how many and what the distribution of the area between the different wards should be and by forbidding any delegation of that function to any other authority, the Rules impose upon the District Magistrate a burden which it may not always be practicable for him to bear. Government may therefore consider whether they should not repeal or at least modify Rule 45 of the Rules. The Rule must have been framed because it was considered important to keep certain functions under the Act exclusively in the hands of the head of the district, but if the present case be typical of the manner in which the functions are performed in practice there is no reality in the provision and nothing will be lost by its disappearance.

In my view, although it is not possible to approve of the manner in which the respondent proceeded, the appeal must, for the reasons I have given fail. It is accordingly dismissed, but no order will be made as to costs.

**Lahiri, J.:**—I agree.

*Appeal dismissed.*

N. C. S.

## ORIGINAL CIVIL

*Before the Hon'ble Mr. Justice S. P. Mitra.*

Civil

1962

MANI LUXMI PATEL & ORS.

Vs.

March, 30.

HINDUSTHAN CO-OPERATIVE INSURANCE SOCIETY LIMITED & ORS.

*Code of Civil Procedure 1908 (Central Act V of 1908), Section 80—When necessary—Life Insurance Corporation Act, 1956 (Central Act XXXI of 1956)—Life Insurance Corporation of India, constituted under, if a distinct legal entity—Insurance policy, breach of warranty, when waived.*

Notice under Section 80 of the Code of Civil Procedure, 1908, need not be served where no wrongful act of the Government defendant is alleged; no cause of action is alleged against it, and no relief is claimed against it.

The Life Insurance Corporation constituted by the Life Insurance Corporation Act, 1956 is a distinct legal entity, and is not a department of the Central Government.

When knowledge can be properly imputed to the Company, the fact that there is warranty may become immaterial, because, if the company issued the policy with knowledge that the facts were not as warranted, the breach of warranty would be waived.

The material facts will appear for the Judgment.

C. Tandon—*for the Plaintiff.*

B. N. Sen with M. K. Banerjee—*for the Defendants.*

The Judgment of the Court was as follows:—

**S. P. Mitter, J.:**—This is a suit for recovery of a sum of Rs. 10,000/- and for other reliefs. The plaintiffs case is that the defendant No. 1 namely, the Hindusthan Co-operative Insurance Society Ltd., at all material times carried on business, inter alia, of life insurance, at No. 4 Chittaranjan Avenue in Calcutta. By the Life Insurance (Emergency Provisions) Ordinance No. 1 of 1956 the entire management and administration of the affairs and business of the life department of the defendant No. 1 had vested in and come under the direct control of the Union of India with effect from the 19th January, 1956.

On the 22nd November 1952 a local agent of the defendant No. 1 approached the husband of the plaintiff No. 1 Shantilata Chhotalal Patel for having insurance on his life and on the persuasion of the agent Shantilal agreed to have his life insured with the defendant No. 1 for the sum of Rs. 10,000/-. The local agent asked Shantilal to put his signature on the proposal from which he took away saying that he would do the rest himself and that on satisfactory report of the Company's Doctor and upon payment of the premium Shantilal would get the policy. The company's doctor thereafter examined Shantilal and after the premium was paid, the defendant No. 1 issued in his favour its Policy No. 787133. The assured could only sign his name in English and had no knowledge of the language at all.

Shantilal died on the 20th February, 1953 leaving his wife the plaintiff No. 1 and his son Vinobhai, the plaintiff No. 2 as his heirs. All the premiums that fell due before his death had been paid by the insured.

By letter dated the 27th February, 1953 the plaintiffs informed the defendant No. 1 of the death of Shantilal. Then by letter dated May 26, 1953, the plaintiffs preferred their claim enclosing the relevant documents.

After repeated enquiries the defendant No. 1 informed the plaintiffs by letter dated the 6th January, 1954 that the matter was under enquiry and was being expedited and on completion of the enquiry the decision of the defendant No. 1 would be communicated to the plaintiff.

The plaintiffs were contemplating the institution of a suit against the defendant No. 1 when the Ordinance was promulgated. The plaintiffs were advised to serve a notice on the Union of India under section 80 of the Code of Civil Procedure. Accordingly, a notice dated the 13th and 17th February, 1956 was served.

In reply to the plaintiffs solicitor's letter of demand to the defendant No. 1 dated the 15th December, 1955 and the notice under section 80, the defendant No. 1 by letter dated the 12th March, 1956, wrongfully repudiated the claim by alleging that the assured had suppressed various informations at the time of taking out the policy.

The Union of India is the defendant No. 2. It is stated in paragraph 13 of the plaint that the Union has been added as proforma defendant inasmuch as in pursuance of the said ordinance the entire Control, management, administration and assets of the defendant No. 1 had vested in or been taken over by the Union. The plaintiffs claim no reliefs against the defendant No. 2.

By an amendment of the plaint the Life Insurance Corporation of India has been added as the defendant No. 3 in view of the provisions of the Life Insurance (Emergency Provisions) Act, 1956.

It is alleged in paragraph 15 of the plaint that the plaintiffs is not barred by limitation inasmuch as the assured died on the 20th February, 1953 and

the defendant No. 1, by letter dated the 6th January, 1954 assured the plaintiffs that the said claim was under enquiry and by letter dated the 12th March, 1956 repudiated the claim for the first time. Moreover, notice under section 80 of the Code of Civil Procedure was necessary in the instant case.

The defence of the defendant No. 1, inter alia, is that by virtue of the provisions of the Life Insurance (Emergency provisions) Ordinance 1956 and the Life Insurance (Emergency Provisions) Act, 1956, on and from the appointed date, that is, the 19th January, 1956 the management of the Controlled business insurers including the defendant No. 1 vested in the Central Government pending the appointment of a custodian for the controlled business of each of the insurers. Shri Dharendra Nath Mitra was appointed custodian on the 20th January, 1956, when he took over the management of the controlled business of the defendant No. 1.

On the 23rd November, 1962 a proposal was received by the defendant No. 1 for a policy of insurance on the life of Shantilal C. Patel for the sum of Rs. 10,000/-. The medical examination of Shantilal was held on the 25th November, 1952 and a letter of acceptance was issued on the 6th December, 1952. The risk commenced on the 23rd November, 1952.

The Policy of Insurance, inter alia, provided that the same was subject to conditions of the policy that if the proposal, declaration and statement on the basis of which the policy was to be effected contained any untrue statement the policy would be treated as void. The proposal declarations and statements made by the deceased to the defendant No. 1 and certain personal statements of the deceased to the Medical Examiner contained untrue statements. The particulars of such statements given in paragraph 4 of the written statement are as follows:—

(a) The assured suppressed that fact that his proposal bearing No. 38805 of 1939, made to The Oriental Government Security Life Assurance Company Ltd. was declined by the said company.

(b) On the 24th January, 1947 the assured made a proposal to the United India Life Assurance Company Ltd. for Rs. 10,000/- which was accepted with an extra premium of Rs. 4/- per thousand.

(c) The assured gave untrue replies to questions Nos. 11(a) and (b) of the proposal form signed by him. Both the questions were answered by the assured in the negative.

(d) The assured failed to disclose that he had received medical advice after the date of the proposal but before full compliance with the terms of its acceptance. The assured failed to disclose that he consulted Dr. Nripati Ranjan Sarkar on the 22nd December, 1952, that is, before the payment of the first premium on the 23rd December, 1952 when he suffered a deterioration in the state of his health.

The defendant No. 1 admits that it was informed of the death of Shantilal but has no knowledge as to who his heirs are. The plaintiffs claim is also barred by the law of limitation.

The following issues were raised:—

1. Is the suit barred by limitation?
2. Are the plaintiffs the only heirs and legal representatives of Shantilal Patel?
3. Did Shantilal Patel sign a blank proposal form which was later filled in as alleged in paragraphs 3 and 5 of the plaint?
4. Is the policy void on grounds stated in paragraph 4 of the written statement?
5. To what relief, if any, are the plaintiffs entitled.

#### ISSUE NO. 1.

It is common case that the relevant article of the Limitation Act is Article 86(a). This is a suit on a policy of Insurance when the sum insured is payable after proof of the death has been given to or received by the insures. The period is 3 years from the date of the death of the deceased. Shantilal died on the 20th February, 1953, but this suit was instituted on the 20th April, 1956.

Mr. Tordon appearing on behalf of the plaintiffs contended that the suit was not barred as it was necessary to serve a notice under Section 80 of the Code of Civil Procedure. He relied on the decision in *Banku Behari vs. Harendra Nath*(1) for the proposition that where property in the hands of a receiver is intended to be affected by the result of the litigation, the Receiver

(1) (1910) 15 C.W.N. 54.

is a proper and necessary party. According to him under Section 3(1) of the Ordinance on and from the appointed date the management of the controlled business of all insurers vested in the Central Government. Under Section 3(3) no insurer could without the previous approval of the person specified by the Central Government in this behalf in respect of that insurer make any payment. Under Section 3(5) every insurer was to deposit all securities and documents of title appertaining to the controlled business in banks specified therein and no security or document was to be withdrawn from the bank except with the permission of the authorised person. Under section 3(6) every insurer was to deliver at the place and to the person specified in this behalf by the Central Government the minutes book or any other book, the current cheque books, all registers or other books and all broker's notes or certificates.

From all these provisions. Mr. Tandon has argued, it is clear that the Central Government was in the position of a Receiver. The assets of the controlled business were completely in the hands of the Central Government. The Union of India therefore was a necessary party to the suit and notice under Section 80 had to be served.

It is true that in paragraph 13 of the plaint it has been stated that the defendant No. 2 namely, the Union of India, has been added as proforma defendant and the plaintiffs claim no reliefs against this defendant. Even then according to Mr. Tandon, notice under Section 80 had to be served. He relies on the judgment of the Patna High Court in *Secretary of State vs. Amar Nath*(1). In this case it has been held that Section 80 deals with two classes of suits, (a) suits against the Secretary of State for India-in-Council and (b) suits against a public officer in respect of any act purporting to be done by such public officer in his official capacity. With regard to both these classes of suits the section is clear and peremptory and notice must be served on the Secretary of State or on the public officer, as the case may be, as a condition precedent to the institution of the suit. One cannot read into the section an interpretation that in a suit against the Secretary of State notice is not required where no relief is sought as against him. I am unable, with great respect, to agree with this view. Section 80 specifically provides that, the person giving notice must state, inter alia, his cause of action and the relief which he claims. If the plaintiff has no cause of action against a particular defendant and claims no relief against that defendant I do not see why notice under Section 80 should be served. The Patna High Court has placed reliance on two judgments, of the Privy Council. The first case referred to is that

(1) A.I.R. (1936) Patna 339.

of *Rebati Mohan Das vs. Jatindra Mohan Ghose*(1). The Patna High Court quotes the observations of Sir George Lowndes that, "the learned Subordinate Judge held that the section had no application to suits in contract, and this dictum was rightly repelled by Mukherjee, J., who delivered the judgment of the High Court. Having regard to the decision of this Board in *Bhagchand Dagadusa vs. Secondary of State for India in Council*(2) their Lordship think that no such distinction is possible." No one disputes the position that section 80 applies to suits to contract. But that does not support the view taken by the Patna High Court in *Secondary State vs. Amar Nath*(3). Incidentally it may be observed that the Privy Council in *Rebati Mohan's Case*(1) said that in the case of a suit against a public officer it was only where the plaintiff complained of same act purporting to have been done by him in his official capacity that notice was enjoined.

The second case to which the Patna High Court has referred is the case of *Bhagchand vs. Secretary of State*(4). In this action 48 plaintiffs joined in suing the Secretary of State for India and the Collector and District Magistrate of Nasik for two kinds of reliefs; (a) a declaration that certain official notices and orders were *ultra vires* and invalid, and (b) an injunction permanently restraining all executive action thereunder. Viscount Sumner observes:—

"Section 80 is express, explicit and mandatory and it admits of no implications or exceptions. A suit in which, inter alia an injunction is prayed is still 'a suit' within the words of the section, and to read any qualification into it is an encroachment on the function of legislation."

These observations indicate that when the relief claimed is an injunction a notice under section 80 is necessary. To my mind *Bhagchand's case*(4) is no authority for the proposition that where there is no cause of action and no relief is claimed a notice under Section 80 has to be served. The decision of the Patna High Court was followed in *Madras Province vs. Maharaja of Jaypur*(5). This was a case of suits brought against the Province of Madras under Section 14 of the Madras Survey and Boundaries Act. But I find in the judgment of Happell, J. that although the lower court had proceeded on the footing that the Government was not a necessary party, the Government itself had not conceded the position.

I may, in passing, refer to the judgment of this Court in *Bhuban Mohini vs. Biraj Mohan*(6), it has been observed as follows:—

(1) (1934) 61 I.A. 171.

(3) A.I.R. (1936) Patna 339.

(5) A.I.R. (1943) Mad. 284.

(2) (1927) 51 Bombay 725.

(4) (1927) 54 I.A. 338.

(6) (1939) 44 C.W.N. 74 to 78.

"I think . . . . . when no relief is claimed against the receiver personally, and the suit is really against the estate which does not vest in the receiver, but which is held by him under orders of the Court which made the appointment, the suit cannot be said to be one against the Receiver within the meaning of section 80 C. P. Code, contemplates in my opinion a suit against the Receiver which seeks to make him personally liable for acts, done or purporting to be done by him in his official capacity, and it does not contemplate a case where a suit for possession is brought against the owner of the estate in respect of which he has been appointed a Receiver, and which suit he has got to defend under powers conferred on him by the Court. In such cases it is undoubtedly necessary to take the leave of the Court which appointed the Receiver, before the latter can be made a party to the proceeding, and that is on the principle that interference with the possession of the Receiver without leave, would amount to contempt of the Court whose officer the Receiver is. But there is in my opinion no necessity to serve upon him a notice under Section 80 and there can be no meaning in sending such notice."

In the instant case no wrongful act of the Union of India is complained of in the plain. No cause of action against the defendant No. 2 has been alleged. No relief has also been claimed against the defendant No. 2. In these circumstances it seems to me there was no scope for service of notice under section 80 of the Code of Civil Procedure.

There is another aspect of this matter. When this suit was instituted the Life Insurance (Emergency Provisions) Act 1956, had come into force. Its predecessor was the Ordinance. Section 3(1) of the Act provides that on and from the appointed date the management of the controlled business of all insurers shall vest in the Central Government. Then came the Life Insurance Corporation Act of 1956. Section 7(1) of this Act prescribes that on the appointed day, that is, on the day of the establishment of the Life Insurance Corporation under the provisions of the Act, there shall be transferred to and vested in the Corporation all the assets and liabilities appertaining to the controlled business of all insurers. The Life Insurance Corporation has been made a party to the suit by an amendment and is now the defendant No. 8.

The effects of these provisions have been considered by the Allahabad High Court in *Madan Mohan vs. Omprakash*(1). An application under Article 226 of the constitution was made to the Allahabad High Court for a writ of quo-

(1) A.I.R. (1957) Allahabad 384.

warrants against a member of a Municipal Board to show the authority by which he was holding the office of the member. The person concerned was originally an employee of the Bharat Life Insurance Company Limited. The management of the Company was taken over by the Central Government on the 19th January, 1956 when the Life Insurance (Emergency Provisions) Ordinance, 1956 came into force which was followed on the 21st March 1956 by Act 9 of 1956. The main contention of the petitioner was that by reason of the Ordinance the management of the Insurance Company vested in the central Government and the member concerned became an employee of the Central Government and ceased to be a member of the Municipal Board by reason of the provisions of section 13D-(f) of the Municipalities Act. It was contended further that in any view of the matter on the 1st of September, 1956 when the Life Insurance Corporation came into existence he became an employee of the Central Government through the Corporation and became disqualified to be a member of the Municipal Board, Mehrotra, J. has analysed the provisions of the Ordinance of Act 9 of 1956 and the Life Insurance Corporation Act of 1956. His Lordship came to the conclusion that under the provisions of Act 9 of 1956 the Insurance Company as such did not vest in the Central Government. It was only the management which vested in the Central Government. The employees of the Insurance Company continued to be the employees of the Insurer Company. It might be that the control over the employees after the coming into force of the Act could be exercised by the Central Government though the custodian appointed by it, but the employees continued to be in the service of the Insurer Company. The Insurance Company as such did not lose its legal entity and the relationship of employer and employee continued between the Insurer Company and its employee. It could not be said that the employees of the Insurer Company became the employees of the Central Government which did not become a substitute of the Insurer Company by the coming into force of this Act. Analysing Section 11 of the Life Insurance Corporation Act his Lordship has said that the appointing authority or it may even be called, the creator of the Corporation is the Central Government. But every employee of the Insurer Company becomes an employee of the Corporation with effect from 1st September, 1956. Great powers have been given under the provisions of the Life Insurance Corporation Act to the Central Government to regulate the constitution and the powers of the Corporation and even it may be assumed that the Central Government created this Corporation to carry on certain business activity, but that does not lay down that the Corporation is a department of the Central Government. From the examination of the provisions of the Life Insurance Corporation Act it is clear that the Corporation is a distinct legal entity created by statute and has perpetual succession with a right to hold and acquire property.

With respect I agree with these observations. Mr. Tandon, however, contended that the Allahabad High Court did not decide whether the Central Government was a proper party to an action against the Insurer Company or the Corporation. He has urged that as the Central Government had taken over the control of assets of the Insurer Company as also its management it was a necessary and proper party and that is why his clients had served in the instant case a notice under section 80.

A similar question arose before the Patna High Court in *A. F. Ferguson Company vs. Lalit Mohan*(1). In this case by a notification under Rule 113A of the Defence of India Rules, the Central Government handed over the management of an enemy Insurance Company to a firm of Chartered Accountants which was asked to manage the business of the Company subject to the superintendence, direction and control of the Central Government and the firm management of the Company was to be accountable to the Central Government. In a suit by the insured against the firm of Chartered Accountants as representing the Company, the Governor-General-in-Council, it was held by the Patna High Court, against whom no relief was claimed and who had no interest in the subject matter of the suit, was not a necessary party. As the Governor-General-in-Council was not a necessary party no notice under section 80 was also required.

It is true that the provisions of Rule 113A of the Defence of India Rules and those of the Ordinance of 1956 and the subsequent Act 9 of 1956 are not the same. Rule 113A for instance specifically mentions that the person authorised to carry on the business of an enemy firm would be deemed to be acting as an agent of the firm. In the instant case the management of the controlled business of all insurers vested in the Central Government and pending the appointment of a custodian for the controlled business the persons in charge of the management of such business were to be in charge of the management of the business for and on behalf of the Central Government vide section 3(1) of Act 9 of 1956.

Then section 4 prescribes as follows:—

“(1) The Central Government may, as soon it is convenient administratively so to do, appoint any person as custodian for the purpose taking over the management of the controlled business of an insurer.

(2) On the appointment of a custodian under sub-section (1) all persons in-charge of the management of the controlled business of the

(1) A.I.R. (1954) Patna 596.

insurer for and on behalf of the Central Government immediately before such appointment shall cease to be in-charge of such management and shall be bound to deliver to the custodian all books of accounts, registers or other documents in their custody relating to the controlled business of the insurer.

(3) Nothing contained in sub-sections (3), (5) and (6) of section 3 shall apply to any insurer the management of whose controlled business has been taken over by the custodian, but the Central Government may issue such directions to the custodian as to his powers and duties as it deems desirable in the circumstances of the case and the custodian may apply to the Central Government at any time for instruction as to the manner in which he shall conduct the management of the controlled business of the insurer or in relation to any matter arising in the course of such management.

(4) The custodian shall receive such remuneration as the Central Government may fix; and the Central Government may at any time cancel the appointment of any person as custodian and appoint some other person in his stead."

Sub-section (3), (5) and (6) of section 3 of Act 9 of 1956 relate to the period of management by the employees of the Insurer Company for and on behalf of the Central Government.

In the case before me it appears from paragraph 2 of the written statement of the Hindusthan Co-operative Insurance Society Limited (the defendant No. 1) and the Life Insurance Corporation of India (the defendant No. 3) that on the 19th January, 1956 the management of the defendant No. 1 vested in the Central Government. On the following day namely the 20-1-56 Sri Dhirendra Nath Mitra was appointed the custodian of the defendant No. 1 and he took over the management of its business. These facts are not disputed.

Now, in view of what I have stated above especially the provisions of sections 3 and 4 of Act 9 of 1956. I do not see how the Union of India was interested to the subject matter of this suit, which was instituted on the 20th April, 1956. The Union of India to my mind was not a necessary party and as such notice under section 80 of the Code for the purpose of suing the Union was not required.

Having regard to the conclusions I have arrived at, the notice in my opinion does not save limitation.

The next argument of Mr. Tandon was that assuming that the notice under section 80 was not necessary in the instant case it has also been alleged in paragraph 15 of the plaint that the assured died on the 20th February 1953 and the defendant No. 1 by its letter dated the 6th January 1954 assured the plaintiffs that the said claim was under enquiry and by letter dated the 12th March 1956 repudiated the claim for the first time. In other words, Mr. Tandon submits limitation has been saved by 'acknowledgment' within the meaning of section 19 of the Indian Limitation Act. By letter dated the 12th March, 1953 (Ex. A page 16) the defendant No. 1 sent to the plaintiff No. 2 the request claim forms for completion. The defendant No. 1 states that the completed forms along with a certified extract from the Official Death Register should be returned to the defendant No. 1 "to enable us to consider the claim." By letter dated the 26th May 1953 (Ex. A. page 18) the plaintiff No. 2 sends to the defendant No. 1 the claim form duly completed and other documents. Then on the 30th May 1953 (Ex. A. page 22) the defendant No. 1 writes to the plaintiff No. 2 that "the matter is having our attention and you will hear from us in due course." On the 6th/7th January 1959 one of the letters relied on in paragraph 15 of the plaint the defendant No. 1 writes to the plaintiff No. 2 as follows:—

"As you are aware, this is an early claim and the matter is under enquiry. The enquiry is not yet complete. The matter is being expedited. On completion of the enquiry the decision will be intimated to you thereafter."

A copy of this letter is at page 25 of the Exhibit "A". According to Mr. Tandon the basis of the plaintiffs' claim is admitted in this letter but the defendant No. 1 informs the plaintiff No. 2 that it was making enquiries as to whether it would pay or not. Then there was the notice under section 80 of the Code of Civil Procedure dated the 9th February 1956 addressed by the plaintiffs solicitor to the "Union of India, through the Secretary to the Ministry of Finance." (Ex. 'A' page 31). Lastly, comes the letter of March 9, 1956 (Ex. A. page 33) wrongly stated as the latter of the 12th March 1956 in paragraph 15 of the plaint. In this letter the defendant No. 1 has refused to meet the claim. The letter runs thus:—

"It appears that the deceased assured had been suffering from various ailments at the time when the first premium was paid. This fact was not disclosed to the society in terms of the acceptance letter.

Besides he suppressed the information regarding the declination and acceptance at extra rate of his previous proposals to other complains. In view of the above no claim arises under the policy.

Mr. Tandon has referred to Explanation I in section 19 of the Limitation Act. The Explanation is as follows:—

“For the purposes of this section an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set off, or is addressed to a person other than the person entitled to the property or right.

Learned Advocates contention is that the letter of the 6th or 7th January 1954. (Exhibit ‘A’ page 25) comes within the scope of the Explanation. This letter is a reply to the letter of the plaintiff No. 2 dated the 29th December 1953 (Ex. A page 24). The plaintiff No. 2 wrote to the defendant No. 1 as follows:—

“I have already submitted all required papers by you regarding the death . . . . .

Many verbal reminders have been noted by your officers and also written reminder has been sent to you but not a single acknowledgment has been sent to me by your office.

By this I give you a third reminder in writing and hope you will please let me know what steps you have adopted to pay me the said claim.

Kindly let me know by return where and how far the claim has been considered by you. At least please show me the courtesy to acknowledge my letters and—reminders. If nothing is heard from you I am sorry I shall have to entrust this matter to my legal advisers. Hope you will please do the needful in the matter and will not drag me to the legal steps. . . . .”

The defendant No. 1. Mr. Tandon has urged, being confronted with this letter wrote to the plaintiff No. 2 on the 6th or 7th January, 1954 that as this was an early claim the matter was still under enquiry. The claim was not denied but the time for enjoyment, according to the defendant No. 1, had not yet arrived.

My attention was drawn to the case of *Jainarain vs. The Governor-General of India*(1). This was an action for damages for loss of goods handed over to the Railway for carriage. In course of a letter the Railway informed the plaintiff as follows:—

(1) A.I.R. (1951) Calcutta 462.

“ With reference to your letter No. nil dated:—2, 8, 44. I beg to inform you that one bundle of cloth belonging to the above consignment is lying undelivered of destination at your sole risk and responsibility and incurrings wharefage of the same at an early date?

If delivery is not taken or instruction received as to its disposal within 15 days from the date of this letter the bundle will be disposed of under section 55 and 56, Railways Act 9 of 1819 to defray the charges due to the Railway.”

Construing this letter Chakravartti, J. (as His Lordship then was) observes as follows:—

“ The Railway admits that the bundle of cloth was received for carriage; it admits that it was under an obligation to carry the bundle and to deliver it; it admits further that it has not yet delivered the bundle and I may add, admits that it is still liable to make delivery. In these circumstances, it seems to me, the receipt of the bundle for carriage and its non-delivery being both admitted, the liability for compensation on account of non-delivery was, under the wide meaning attributed by the Privy Council to section 19, Limitation Act, acknowledged by the Railway.”

Chakravartti, J. has observed further that the substance of judicial decision appears to be that it is not necessary that there should be a specific and direct acknowledgment of that particular liability which is sought to be enforced, but if there is an admission of facts of which the liability in question is a necessary consequence, there would be an acknowledgment within meaning of section 19.

Mr. Tandon has argued that in the letter on the 6th or 7th January, 1954 the defendant No. 1 admits the existence of the policy; it admits also a liability under the policy.

It is obvious that the letter which came up for construction before Chakravartti, J. was in stronger and clearer terms. As has been pointed out by Renupada Mukherjee, J. in *Balchand vs. Union of India*(1). Chakravartti, J. held upon construction of this letter written by a responsible Railway officer that all the elements constituting the liability of the Railway had been admitted in this letter. In the instant case it has to be seen whether the letter of the 6th or 7th January, 1954 contains admission of facts of which the liability in question is a necessary consequence.

(1) 1957) 100 C.L.J. 172.

The next case relied on was the judgment of Bose, J. (as His Lordship then was) in *Hindusthan Housing & Development Trust Limited vs. The State of West Bengal*(1). This was a case for recovery of compensation for requisition properties. His Lordship was of opinion that Article 120 was applicable to the case. As it was argued that Article 115 was attracted his Lordship observed as follows:—

“Now assuming that Article 115 of the Limitation Act is attracted to this case, the next question is whether the acknowledgments of liability pleaded in the plaint are sufficient acknowledgments in law for the purpose of saving the claim from being barred by limitation.

The first letter relied on at the hearing is dated 20th April, 1949 (P.D. 9). This letter is addressed to M/s. Talbot & Co. the agents of the plaintiffs, and is written by an officer of the Land Acquisition Collectors Department. A request is made in this letter to send bills in quadruplicate for the period from 29-6-46 to 18-8-47 . . . . . for submission before the application committee. As regards the compensation for the subsequent period. . . . . it is stated that the dues would be paid upon Government's sanction being obtained. In the next letter dated the 15th June, 1949 (P.W. 7) Special Officer of the Finance Department (application committee records the fact that the pre-partition claim was awaiting scrutiny by the East Bengal (Audit) wing of the Application Committee). The clear implication of these two letters is that if the application committee decides that the sum claimed is payable by the Government of West Bengal the letter would pay it.

By their letter of the 27th February, 1950 the Collector's office requested the plaintiff to submit paid up bill of Municipal taxes before the Executive Engineer, Suburban Division for the period 29-6-46 to 31-3-47 for his verification and for payment. These letters clearly show that the Collector's office was acknowledging that there was claim for compensation outstanding for a certain period at a certain rate and that the Government was also liable to pay Municipal taxes as part of the compensation payable in respect of the lands.”

I have set out the above quotation from the judgment of Bose, J. just to show that the nature of acknowledgments in the letters relied on in that case was entirely different. Those letters cannot be compared with the letter of the 6th or 7th January 1954 in the instant case.

(1) (1954) 59 C.W.N. 405.

The Supreme Court dealing with acknowledgments under section 19 has recently pointed out in *S. F. Mazda vs. Durga Prosad*(1), that the effect of the words used in a particular document must inevitably depend upon the context in which the words are used and would always be conditioned by the tenor of the said document, and so unless words used in a given document are identical with words used in a document judicially considered it would not serve any useful purpose to refer to Judicial precedents in the matter.

This was also the view of Maclean, C. J. in *Jogeshwar Roy vs. Rajnarain Mitteh*(2). Some assistance may be derived however, from the facts of this case. In reply to a letter enclosing a bill for work done the defendant wrote: "the bill glanced over is incorrect; large amounts have been wrongly introduced. I will first have the work examined, although I know that the whole of the work is not yet finished; then I would examine the estimate and after deducting what has to be deducted I will see what is due."

Maclean, C. J. in construing this letter observed as follows:—

"It will be noticed that in the letter in reply where to the alleged acknowledgment was sent the builder said that the works were finished is challenged by the defendant, who says that the whole of the work was not yet finished. Does the so-called acknowledgment, if paraphrased, amount to anything more than this: 'I have received your bill; I think it is in correct; there are many errors in it; the work is not finished. I will look at the estimates and have the work examined, and I will see if anything is due; or it might be put: 'I have received your bill. I do not think it is correct. I will look into the matter and see if anything is due.' I do not see how we can say that if a man says he will see if anything is due, that is an acknowledgment of liability that anything is due."

Another case cited before me was the decision in *Bhairo Prosad vs. Gajadhar Prosad*(3). Here it was held that a letter which merely said that the writer after looking into the account would sign it was not an acknowledgment of liability on an account stated.

In the instant case the letter of the defendant No. 1 dated the 6th or 7th January, 1954 is a reply to the letter of the plaintiff No. 2 dated the 29th December, 1953. The plaintiff No. 2 wrote about repeated demands made for payment of the claim and was giving a further reminder. The plaintiff No. 2

(1) A.I.R. (1961) S.C. 1236.

(3) (1914) 19 C.W.N. 170.

(2) (1903) I.L.R. 31 Calcutta 195 at 200.

wanted to know to what extent the claim had been considered by defendant No. 1. The plaintiff No. 2 invited an acknowledgment of his letters and reminders and stated further that if nothing was heard from the defendant No. 1 the matter would be intrusted to legal advisers. In reply to this the defendant No. 1 states that the plaintiff No. 2 is aware that this is an early claim. In other words the claim has been made or the death of the assured has occurred, soon after the policy was taken out. The Insurance Society was not in a position to make payment as the premature death of the assured necessitated inquiries or investigations. Until those enquiries or investigations were completed the defendant No. 1 was not inclined to make any commitments. The defendant No. 1 specifically states that upon completion of the enquiry its decision would be communicated to the claimants.

In these circumstances, as in the case before Maclean, C. J., I am unable to come to the conclusion that the letter of the 6th/7th January 1954 can be treated as an acknowledgment of liability within the meaning of section 19, Limitation Acts. It appears further that Vinoobhai Shantilal Patel the addressee of this letter did not think that there was on this letter did not think that there was on this occasion or on any other occasion or any acknowledgment of liability on the part of the defendant No. 1, vide question 362 and 363.

In the case reported in *Mazda vs. Durga Prosad*(1). I have already referred to, a mortgaged property was put to sale by the first mortgagee, the mortgagor rushed to the second mortgagee to stop the sale and the latter stopped it by making certain payments. Subsequently, when it was again advertised for sale, the mortgagor wrote to the second mortgagee—"as you are interested why do you not take the whole. There is only about Rs. 70,000/- due to the mortgagee. A payment of Rs. 10,000/- will stop the sale." It was held that the tenor of the letter showed that it was addressed by the mortgagor to the respondent No. 1 as pusine mortgagee; it reminded him of his interest as such mortgagor in the property which would be put up for sale by the first mortgagee, and appealed to him to assist the avoidance of sale and thus acquire the whole of the first mortgagee's interest. As no other relationship existed between the parties at the date of this letter, and the only subsisting relationship was that of pusine mortgagee and mortgagor, the letter acknowledged the existence of the said jural relationship, and amounted to a clear acknowledgment under section 19 of the Limitation Act.

(1) A.I.R. (1961) S.C. 1236.

At page 1238 it is observed as follows:—

“It is thus clear that acknowledgment as prescribed by section 19 merely renews the debt, it does not creat a new right of action. It is a mere acknowledgment of the liability in respect of the right in question; it need not be accompanied by a promise to pay either expressly or even by implication. The statement which a plea of acknowledgment is based must relate to a present subsisting liability though the exact nature or the specific character of the said liability may not be indicated in words. Words used in the acknowledgment must, however, indicate the existence of jural relationship between the parties such as that of debtor and creditor, and it must appeal that the statement is made with the intention to admit such jural relationship, such intention can be inferred by implication from the nature of the admission and need not be expressed in words. It the statement is fairly clear then the intention to admit jural relationship may be implied from it. The admission in question need not be expressed but must be made in circumstances and in words from which the Court can reasonably infer that the person making the admission intended to refer to a subsisting liability as at the date of the statement. In construing words used in the statements made in writing on which a plea of acknowledgment rests oral evidence has been expressly excluded but surrounding circumstances can always be considered. Stated generally, Courts lean in favour of liberal construction of such statements though it does not mean that which no admission is made one should be inferred, or where a statement was made clearly without intending to admit the existence of jural relationship such intention could be fastened on the maker of the statement by an involved or far-fetched process of reasoning. Broadly stated, that is the effect of the resevant provisions contained in section 19 . . . . .”

In the case before me when the defendant No. 1 wrote to the plaintiff No 2 that as this was an early claim the matter was under enquiry and on completion of the enquiry the decision of the defendant No. 1 would be communicated no jural relationship was admitted either expressly or by implication. I hold therefore that the present suit is barred by limitation.

#### ISSUE NO. 2

On behalf of the plaintiffs the succession certificate granted in their favour on the 13th March, 1961 marked Ex. 'C' has been produced. In views of this document Mr. B. N. Sen, learned Counsel for the defendants has not pressed this issue.

## ISSUE NO. 3

It is alleged in paragraphs 3 and 5 of the plaint that on the 22nd November, 1962 a local agent of the defendant No. 1 approached Shantilal for having an insurance on his life. On the persuasion of this agent Shantilal agreed to have his life insured with the defendant No. 1 for the sum of Rs. 10,000/-. The local agent then asked Shantilal to put his signature on the proposal form. He took away the proposal form saying that he would do the rest himself and on a satisfactory report of the Insurance Company's doctor and upon payment of premium Shantilal would get the Policy. Shantilal simply signed the proposal form in England, the rest of the form must have been filled in by the agent.

The plaintiff No. 2 in his evidence has stated that this father had no knowledge of English language. At about 8 or 8-30 in the morning towards the end of November, 1952, one Mr. Chatterjee approached his father on behalf of the defendant, No. 1. Mr. Chatterjee came with his maternal uncle one Mr. D. Mukherjee who was an Excise Inspector and was known to Shantilal. Shantilal, after a good deal of hesitation ultimately agreed to take out a policy on being pressed by Chatterjee and Mukherjee. Chatterjee brought out a proposal form and put the questions that were written in the form to Shantilal. As the questions were being put by Chatterjee, Shantilal went on replying to them. Chatterjee brought out a note book and made notes of the answers given by Shantilal. Shantilal asked the plaintiff No. 2 to bring out all the previous policies and other papers connected therewith to place them before Chatterjee. These instructions of Shantilal were carried out. Chatterjee looked into all these policies and took down notes. He then requested Shantilal to sign the proposal form. After obtaining Shantilal's signature Chatterjee and his maternal uncle said that they would come in the evening along with the Doctor for medical examination. In the evening at about half-past five or six they came with the Doctor. Chatterjee read out the proposal form to Shantilal. Then the Doctor started examining Shantilal and putting certain question to him. When Chatterjee read out the proposal form to Shantilal he said to Shantilal, "I am reading out to you whatever notes I had made in the morning and if you have anything to say, you can say." (Questions 8 to 36). In questions 37 to 41 Vinobhai Shantilal Patel, the plaintiff No. 2 specifically states that whatever was written by Chatterjee in his note book was correct and there was no difference between the statements made by Shantilal in the morning and what was read out by Chatterjee to Shantilal from the proposal form in the even.

Apart from Chatterjee and the Doctor it is admitted by Vinobhai in questions 32 and 33 the one Mr. Roy Chowdhury who was the Organising Officer

of the defendant No. 1 also came in the evening. His full name is Sudhir Kumar Roy Chowdhury. He has deposed before me. His evidence is that the answers to Ex. '4' which is the proposal form were obtained from Shantilal himself. He had recorded these answers and Shantilal's signature on this form has been attested by him. After completing the proposal form he had explained to Shantilal what had been written therein. Shantilal signed this form after it was filled up questions 1 to 10. Pabitra Chatterjee merely introduced Shantilal to him and went away to attend the office question 71.

\*Having watched on the witness box both Vinoobhai and Sudhir I am inclined to accept the statements of the latter. In any event it is abundantly clear that the plaintiff No. 2 was miserably failed to prove the allegations in paragraphs 3 and 5 of the plaint. The impression sought to be conveyed by these paragraphs is that an agent of the defendant No. 1 procured the signature of Shantilal Patel on a blank proposal form which was later on filed in by him and Shantilal was not aware of the answers to the various questions in the form written out by the agent. From Vinoobhai's evidence it is clear that even if Shantilal had signed a blank proposal form the answers were later on read out to him and were in conformity with the statements made by him previously. In other words it does not appear from the oral evidence of Vinoobhai that the assured was not aware of the contents of the proposal form marked Ex. '4'.

As, however, I accept the evidence of Sudhir Kumar Roy Chowdhury my answer to Issue No. 3 is in the negative.

#### ISSUE NO. 4:

As I have indicated above, four several grounds have been advanced in paragraph 4 of the written statement of the defendant No. 1 in support of the contention that the policy of Insurance is void. After conclusion of the oral evidence Mr. B. N. Sen, learned counsel for the defendants agreed with me that the evidence on record does not justify consideration of grounds (a) and (d). I have therefore to express my views on grounds (b) and (c). These grounds are that on the 24th January, 1947 the assured made a proposal to the United India Life Insurance Company Limited for the sum of Rs. 10,000/- which was accepted with an extra premium of Rs. 4/- per one thousand. And the assured gave untrue—replies to questions Nos. 11(a) and 11(b) of the proposal forms signed by him. Questions 11(a) and 11(b) of the proposal form marked Ex. 4 were as follows:—

" 11(a) Was any proposal accepted with extra and or lien or with any other modification?"

11(b) Was any proposal on your life postponed or not entertained or rejected or any lapsed policy not revived by this society or any other company?"

Both the questions were answered by the assured in the negative. Now, as to the acceptance of the assured's proposal to the United India Life Assurance Company Limited with an extra premium both Vinoobhai the plaintiff No. 2 and the son of the assured and Chotabhai, the brother-in-law of the assured have denied this allegation: vide evidence of Vinoobhai, questions 60, 265, 266, 269, 270, 271 and 272 and evidence of Chotabhai questions 27 and 111. On behalf of the defendants M. Natarajan who was the Chief Assistant of the United India Life Assurance Company Limited in 1947 has deposed before me on this issue. Through Natarajan was tendered Exts. 3, 7 and 8. Ex. 8 is the policy docket of the United India Life Assurance Company Limited. Ex. 7 is the acceptance letter. Ex. 3 is a printed letter addressed to the United India Life Assurance to the United India Life Assurance Company Limited dated the 9th August, 1947 by Shantilal Patel. All these documents indicate that an extra premium was charged by the United India Life Assurance Company Limited. But it is difficult for me to come to the conclusion that these documents have been strictly proved: Vide deposition of Natarajan, question 27 to 36 and 112 to 113. Natarajan, it appears, has no personal knowledge regarding these documents. In the premises I am of opinion that it has not been established by unassailable evidence before me that the United India Life Assurance Company Limited accepted the proposal of Shantilal Patel with an extra premium. I shall now discuss whether the answers to questions 11(a) and 11(b) in the proposal form were correct. So far as question No. 11(b) is concerned there is no evidence to prove that the answer given by the assured was incorrect. With respect to question No. 11(a) I have to refer once again to Ex. 3. As I have said this is a letter in the printed form of the United India Life Assurance Company Limited. The letter runs thus:—

• 1963]

*Moni Luxmi Patel & ors. vs. Hindusthan Co-operative  
Insurance Society Ltd. & ors.*

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THE UNITED INDIA LIFE ASSURANCE  
CO., LTD.

Post Box 281  
MADRAS.

Proposal No. 75787: Own Life.

Dear Sirs,

I agree to the terms and conditions mentioned in your Acceptance Letter dated viz. the following.

Acceptance of my proposal with an extra premium.

Acceptance of my proposal for an altered term viz.

Acceptance of my proposal subject to the inclusion of lieu clause mentioned in your Acceptance Letter.

Phone:—Calcutta

Date:—9-8-47

M.G. 2-M. 295. 5-46

Yours faithfully,

Sd/- Shantilal Patel.

(Signature of the proposer)

It is admitted by Vinoobhai Patel in questions 257 to 259 that the signature on this document is that of Shantilal Patel. The last two paragraphs of the letter have been penned through but Natarajan cannot say that he knows that when Shantilal signed the letter these paragraphs had already been crossed out: vide questions 118 to 128. There is no doubt however that this document shows that the proposal which Shantilal made to the United India Life Assurance Company Limited was not accepted on the usual or ordinary terms; otherwise this printed document which was produced from proper custody would not have been signed by Shantilal. The question which was put to him in Ex. 4 enquired of him, inter alia whether any proposal was accepted with any modification; vide question 11(a). And his answer was in the negative. From the documentary evidence on record it seems to me that this was not a correct answer. Mr. Tandon tried to put to Natarajan in his cross examination that Exhibit 3 might have been taken to Shantilal by the agent himself instead of being sent to him by post in the usual course and the agent might have procured Shantilal's signature on this document without explaining to him the contents thereof: vide questions 107 to 125.

I do not propose to take any notice of this aspect of Mr. Tandon's Cross-Examination in the absence of positive evidence on behalf of the plaintiff. Learned Advocate was suggesting a hypothetical case to the witness and the sum and substance of the witness's answer was that he presumed that the usual procedure was followed:—In fact the agents taking the letter to the assured would be contrary to his instruction vide question 113.

I have now to consider the effect of this incorrect answer to question No. 11(A) in Ex. 4. In *London Assurance vs. Mansel*(1), in a proposal by M to an assurance officer for an assurance on his life, in answer to the question, "Has a proposal ever been made on your life at any other office or offices? If so, where? Was it accepted at the ordinary premium, or at an increased premium, or declined?" His answer was, "Insured now in two offices for £16,000/- at ordinary rates. Policies effected last year." The proposal was accepted but the office having subsequently ascertained that the life of M. had been declined by several offices, it was held that, there had been a material concealment, and that the office was entitled to have the contract set aside. At the end of the questionnaire of the assurance office it was stated, "That this proposal and declaration shall be the basis of the contract between the assured and the Company." In the instant case also the proposal form which was signed by Shantilal on the 23rd November 1952 (Ex. 4.) Contains the following declaration:—

"I . . . . . do hereby declare that the above statements are true and correct and that these statements together with any statements made or to be made by me to the Medical Examiner or to the 'Society shall form the basis of the contract between me and the Hindusthan Co-operative Insurance Society, Ltd. and that if any untrue statement be contained therein, all moneys which shall have been paid on account of the contract shall be forfeited and the assurance shall become null and void . . . . ."

In *Kesava Sēethamma vs. Bombay Life Assurance Co., Ltd.*(2), in answer to a query in the proposal form the insured had stated that he had been insured in another company at ordinary rates without any extra premium being charged or lieu or condition being imposed. The insured had made a formal declaration at the end of the proposal form that particulars given by him in the proposal form were true and he agreed that the proposal and any declaration to be made before the Medical Examiner should be the basis of the contract between him and the defendant company. The statement made

(1) (1879) 11 Ch. Division 363.

(2) A.I.R. (1954) Mysore 134.

in the proposal was found to be false to the knowledge of the deceased insured. It was held that there was fraudulent suppression of material facts on the part of the insured which vitiated the contract and that section 45 of the Insurance Act could not help the plaintiff.

Mr. Tandon's submission on the case reported in *Keseva Seathamma vs. Bombay Life Insurance Co., Ltd.*(1) was that on the finding that the deceased had made a false declaration in the proposal form knowing it to be false the Mysore High Court proceeded to consider whether the same vitiated the contract of insurance. In the instant case it has not been proved that the assured made a false declaration known it to be false. On the contrary the facts go to prove that the assured disclosed everything and, as such, if there was any omissions, suppression or mis-statement it was by the agent.

I have already discussed above the evidence of Sudhir Kumar Roy Chowdhury who says that he got the answers to the printed questions in Ex. 4 from Shantilal Patel. He had correctly recorded those answers and had explained to Shantilal what he had written out in the proposal form. The name of the United India Life Assurance Co., Ltd. was never supplied to him by Shantilal (Qs. 7 to 17). As I have no reason to reject the testimony of Sudhir Kumar Roy Chowdhury it appears that the contents of the proposal form including the writing of Sudhir were read out and explained to the assured and he had adopted them to be correct. It was the duty of the assured to tell Sudhir—that he had a policy issued by the United India Life Assurance Co., Ltd. and that this proposal was not accepted on the usual terms and conditions. It was also his duty to disclose to Sudhir the nature of alterations that were made. I do not agree with Mr. Tandon that this case on the facts can be distinguished from the other decisions cited above.

The only other point argued before me is that when Shantilal had disclosed all the facts to the agent of the defendant No. 1 and had placed before him the policy of the United India Life Assurance Co., Ltd. and the omission or suppression or misstatement was that of the agent, could the policy be now assailed by the defendant of numerous decisions have been relied on by learned counsel for the parties. I do not propose to refer to all these decisions in this judgment. Upon consideration of the authorities cited I am inclined to agree with the observations in Macgillivray on Insurance Law, 4th Edition, Article 935. It is necessary to set out this article fully as the summaries of all the main decisions referred to by Mr. B. N. Sen and Mr. Tandon appear therein.

(1) (1954) Mysore 134.

Article 935 in Macgillivray's Book is as follows:—

"Where knowledge can be properly imputed to the company the fact that there is warranty may become immaterial because, if the company issued the policy with knowledge that the facts were not as warranted the breach of warranty would be waived."

It was upon a mis-application of that principle that the case of *Bawden vs. London, Edinburgh and Glasgow Insurance Co., Ltd.*(1), was decided in favour of the assured. The assured, who was illiterate and almost unable to read or write beyond signing his name, had at the time of his application for an accident policy, lost the sight of one eye. The proposal form was filled up by company's agent in accordance with the answers dictated to him by the assured and was agreed by the assured. The proposal contained a declaration that the assured was in good health and had no physical infirmity and that the statements—contained in the proposal would be the basis of the contract. In the margin opposite the declaration there was a note: "If not strictly applicable any deviation must be given at the back 5." The proposal contained no mention of the fact that the assured had only one eye. During the currency of the policy the assured met with an accident through which he lost the sight of his other eye. The court held that he was entitled to receive the sum assured in the event of loss of sight of both eyes. The agent knew that the assured had only one eye and that he was negotiating with a one-eyed man and in that sense his knowledge was the knowledge of the company. His duty was to communicate the fact to the company by inserting it in the proposal as a deviation from the declaration. The breach of warranty was waived by the issue of the policy with the agent's knowledge which must be imputed to the company, that the assured had only one eye. That case was much criticised by the court of appeal in the case of *New Sholme Brothers vs. Road Transport & General*(2), and cannot now be regarded as a reliable authority. It is probably explicable only by reference to the fact that the assured was illiterate and could not read, and to the special duty which the agent owed to the company in such circumstances to complete the proposal in accordance with the information given to him by the proposer and with such facts as were obvious to him, and therefore to inform the company of the fact that the proposer had only one eye by inserting a statement to that effect on the back of the proposal form as a deviation from the absolute warranty that the proposer had no physical infirmity.

The *New Sholme* case(2) came before the court on a case stated by the arbitration to whom the dispute was referred. The claimants (appellants) made

(1) (1892) 2 Q.B. 534.

(2) (1929) 2 K.B. 356.

a proposal to the respondent Insurance Company for a Motor Car Insurance on their motor bus. The proposal was signed by a partner in the appellant firm but the answers were filled in by an agent of the company. The answers were declared to be true and to be true and to be the basis of the contract. A policy was issued and the premium paid. An accident having occurred whereby the motor bus was damaged and same passengers were injured, the appellants claim to be indemnified under the policy and the company repudiated liability on the ground of mis-statements in the proposal and non-disclosure. The arbitrator found that the answers to three of the questions in the proposal form were untrue, that the agent was told the true facts and that it did not appear why he did not write them down correctly. He also found that the duties of the agent were to canvass for insurance and to obtain duly filled in and signed proposals and to receive premiums, but he had no authority to fill in the proposal form himself. Rowlatt, J. held that there was a breach of warranty and the company was not liable to pay the claim. The court of Appeal . . . . . affirmed the decision of Rowlatt, J. Scrutton, L.J. said, that on the findings of the arbitrator the agent must have written down wrong answers, unintentionally because (a) he misunderstood what was said or (b) forgot or (c) misunderstood the question; or else intentionally. On any of these suppositions he was acting as agent of the proper and not of the company. On the conflict between *Bowden's case*(1) and *Biggar's case*(2), his Lordship observed that the latter was based on a decision of the Supreme Court of United States *New York Life vs. Fletcher*(3), and had been preferred to the former in Scotland Ireland and concluded that the principle of the *Bowden's case*(1) was not applicable where the agent himself, at the answers, in supposed conformity with the information supplied by the proper; for if he knew that the answers were untrue he was committing a fraud on the company which prevented his knowledge being imputed to the company and if he did not know the answers to be untrue there was no knowledge to imputed. Greer, L.J. came to substantially the same conclusion and distinguished *Ayrey vs. British Legal and United Provident Assurance Company*(9), on the ground that in that case the true facts were disclosed to the district manager in person, who had the requisite authority and who by receiving the premiums after notice of the irregularity waived the breach of warranty:—

“In a case before the Industrial Commissioner for Northern Ireland of policy was effected by the assured on the life of his wife, and by the declaration in the proposal the assured warranted that his wife was in good health, whereas to his knowledge she was at the date of the proposal

(1) (1892) 2 Q.B. 534.

(3) (1886) 117 U.S. 519.

(2) (1902) 1 K.B. 516.

(4) (1918) 1 Q.B. 136.

suffering from 'sleepy sickness.' The agent who negotiated the proposal knew that the life assured was in ill health. In an action to recover the insurance money on her death the society pleaded breach of warranty and the assured replied that the warranty was waived because of the agents knowledge of the true facts. The Commissioner disallowed the claim. He says that the doctrine that the knowledge of the agent is the knowledge of the company and that the issue of a policy with that imputed knowledge constitutes a waiver of any breach of warranty that the facts are otherwise, may apply where the proper is illiterate and free from any blame in allowing the misrepresentation to reach the agents principal but does not apply to a case where the proposer is a man of at least average intelligence and is guilty at any rate of negligence in allowing a document under his hand containing a statement which, if he read it, he would know was both false and contrary to the agents knowledge to be placed before the Insurers as the basis of his application for a policy."

In the instant case there is no evidence that Sudhir Kumar Roy Chowdhury or any other agent of the defendant No. 1 who had visited Shantilal had any authority to fill in the proposal form himself. Moreover, it is admitted by the assured's son Vinobhai who is the plaintiff No. 2 that the answers to the questions in the proposal form written down by the agent had been read out and explained to the assured and were accepted by assured. There is no doubt therefore that the agent while filling in the proposal form was acting as the agent of the proposer and not of the company. Assuming therefore that Shantilal disclosed to the agent that he had a policy of the United India Life Assurance Company Limited and his proposal to this company was not accepted on the usual terms and the agent did not mention these facts in the proposal form of the defendant No. 1 marked Ex. 4. I do not see how the agents knowledge could be imputed to the defendant No. 1. I may refer in support of this view also to the decision of the Mysore High Court in *V. K. Srinivasa vs. Premier Life and General Insurance Co., Ltd.*(1).

(1) A.I.R. (1958) Mysore 53.

I hold, therefore, that the policy in suit is void on the ground that the assured gave a untrue reply to question No. 11(a) in the proposal form signed by him.

In the result this suit is dismissed with costs, certified for two counsel.

*Suit dismissed.*

N. C. S.

### APPELLATE CIVIL

*Before the Hon'ble Justice P. B. Chakravartti Chief Justice  
and the Honble Justice S. C. Lahiri.*

SHIROMONI PROSAD BHAKAT

Vs.

AGRICULTURAL INCOME TAX OFFICER, BURDWAN.

Civil

1958

June, 17.

*Bengal Agricultural Income-Tax Act, 1944 (Bengal Act IV of 1944), Section 25(3)—Scope of—Section 56, if deals with assessee and third parties differently—Demand for inspection, to whom to be made—Section 56, in' contrary to Article 19(1) (f) of constitution of India—Section 38(2), if contrary to Article 14 of Constitution.*

Section 25(3) of the Bengal Agricultural Income-Tax Act, 1944, does not say that after an assessee has been heard on the day specified in the notice issued under Section 25(3), and after his evidence has been considered on that date, he has a further right to be present on or to be informed of the date on which the assessment order will be made, if it is not made immediately, or that it will be the duty of the Income-Tax officer to give such information.

An order of assessment or the subsequent order for reassessment could be challenged as void on the ground of the former order having been antedated only when it was proved that antedating had in fact taken place.

Section 56 of the Act makes no difference between an assessee and third parties.

A demand for inspection of the records or of the original order of assessment order has to be made to the Income Tax Officer.

Section 56 of the Act is not affected by Article 19(1) (f) of the constitution.

Section 38(2) of the Act is not inconsistent with Article 14 of the constitution.

The material facts will appear from the Judgment:—

Nirmal Chandra Sen with Shyamapada Choudhury—for the Appellant.

Nirmal Chandra Chakrabarty with Asoke Chandra Sen—for the Respondent.

\* Appeal from Original Order No. 152 of 1956.

The Judgment of the Court was as follows:—

**Chakravartti, C.J.:**—The appellant, Shiromani Prosad Bhakat, complains of an order of Sinha, J., dated the 20th of March, 1956, whereby the learned Judge declined to issue a Rule on an application made by the appellant under Article 226 of the Constitution of India. Although no Rule was issued, the learned Judge placed on record his reasons for not issuing a Rule in a short order.

The case concerns the appellant's assessment for the year 1947-48. It appears that in the return filed by him, he showed an agricultural income of Rs. 3,312, but the Income Tax Officer was not satisfied that the return made was correct and complete. Accordingly, he called upon the appellant to produce evidence in support of his return and in fact considered that evidence and heard the appellant on the 10th of November 1947. A short order, recorded on that date, stated that evidence had been produced and it had been checked and that the assessment order would be made "later on."

The appellant's case is that he heard nothing further about the assessment till a notice of Demand was served upon him on the 20th of August, 1952.

On receiving the notice, he paid the tax under protest and at the same time applied for a certified copy of the assessment order. He obtained the certified copy on the 27th of October, 1952. The assessment order showed that the appellant's gross income had been determined at Rs. 46,663-12-0 and his taxable income at Rs. 21,734-5-0 and that the order had been made on the 28th of March, 1952. The tax assessed and demanded of the appellant was Rs. 1,841-5-0.

The appellant's case throughout has been that the assessment order was not really made on the date ostensibly made, but it was made on a later date. The assessment year being the year 1947-48, the 31st of March, 1952, would be the last date under section 38(2) of the Bengal Agricultural Income Tax Act, on which the assessment order could be made, if it was to be made within the period of limitation. It appeared from the order sheet that there was an order dated the 14th of July, 1952, in which the Income Tax Officer stated that although the assessment had been made on the 28th of March 1952, the Notice of Demand had not yet been issued on account of a very unhappy oversight "and he directed an immediate issue of a notice. The appellant's case is that it was really on the 14th of July, 1952, that the assessment order was actually made, but it was antedated to the 28th of March, 1952, in order to escape the bar of limitation contained in section 38(2) of the Act.

In his appeal to the Assistant Commissioner, the appellant did not directly take the point that the assessment order had been antedated, but merely stated in ground No. 2 of his grounds that "the date of passing the assessment order and the date of communicating the same to the petitioner" were "highly suspicious" and he suggested that the "case or proceeding was in fact time-barred." The Assistant Commissioner noticed the unusual delay which had occurred between the date of the hearing given to the appellant and the date of the assessment order, but he did not find that the order had been antedated. He, however, set aside the assessment order on the ground that in view of the efflux of time between the hearing of the case and the making of the order, some very material points had escaped from the memory of the Income Tax Officer, and, therefore, the order passed by him, being based on an incomplete consideration of the arguments advanced, could not be sustained. On that finding, the Assistant Commissioner directed a fresh assessment.

The appellant next appealed to the Appellate Tribunal and urged the same points as he had urged before the Assistant Commissioner. He failed to persuade the Tribunal that the assessment order had been antedated, nor could he persuade them that he was entitled to a notice of the date on which the assessment order had been made. His appeal to the Tribunal, was, accordingly, dismissed.

The appellant then took the next step provided for in the Act and made an application for a reference to this Court on a multitude of questions. With this application also he failed and the Tribunal declined to make a reference. He then moved this Court under section 63(2) of the Act for a direction on the Tribunal to refer the questions formulated by him, but was again unsuccessful.

Having thus exhausted his remedies under the Act and failed to obtain any relief, the appellant turned to the Constitution of India. On the 20th of March 1956, he moved this Court under Article 226 for a Writ of certiorari, quashing the assessment order of the 28th March 1952 and all subsequent orders made in the proceedings, a writ of mandamus, directing the respondents to the application to forbear from enforcing the order of the 28th of March, 1952 and the subsequent orders and also a writ of prohibition, commanding the Agricultural Income Tax Officer to forbear from proceeding with the fresh assessment. The application, as I have already stated, found no favour with Sinha, J., and he dismissed it at sight, although he gave certain reasons for doing so.

The order of the 28th of March, 1952, is no longer subsisting having been set aside by the Assistant Commissioner on appeal by the appellant himself.

It is, therefore, not clear why the appellant was asking for the quashing of an order which had already been set aside or why he found it necessary to ask for a writ of Mandamus, directing the respondents to forbear from giving effect to that order. Since, however, the appellant included the subsequent orders as well, particularly the order for reassessment, the defect I have pointed out does not affect the maintainability of his application under Article 226 of the Constitution.

Mr. Sen, who has appeared before us in support of the appeal, has urged our grounds, but laid special emphasis only on two of them. His first ground is one which had been canvassed before the Departmental authorities as well. It is contended that this was not a case where the Income Tax Officer was satisfied without requiring the presence of the assessee or the production of any evidence by him that the return was correct and complete. Section 25(1) of the Bengal Agricultural Income Tax Act is thus out of the way. This was a case where the Income Tax Officer called for evidence and heard it and the contention is that if he did so, section 25(3) was attracted and under that section, the appellant was entitled a notice of the date when the assessment order would be made. In my view, this contention is plainly untenable. So far as the language of section 25(3) is concerned, it certainly does not say that after an assessee has been heard on the day specified in the notice issued under section 25(3) and after his evidence has been considered on that date, he has a further right to be informed of the date on which the assessment order will be made, if it is not made immediately or that it will be the duty of the Income Tax Officer to give such information. According to section 25(3), the Agricultural Income Tax Officer is to assess the income of the assessee by an order in writing on the day specified in the notice issued under sub-section (2) of the section "or as soon afterwards as may be." It is thus not necessary that the assessment order itself must always be made on the date specified in the notice. It may be made afterwards, as the sub-section expressly states, but the sub-section does not further say that the assessee is to be called again for the purpose of hearing the assessment order when the order is made on a subsequent date or that information of such date should, in any event, be given to him.

Mr. Sen realised the difficulty of making out his contention on the language of section 25(3) and fell back upon certain observations of the Supreme Court in the case of *Suraj Mall Mohta and Co. vs. A. V. Viswanath Sastri*(1). In that case, the Supreme Court was dealing with the validity of certain provisions of the Taxation on Income (Investigation Commissioner) Act in so far as they were different from the provisions of the Income Tax

(1) (1954) 26 I.T.R. 1-13.

Act or the Code of Civil Procedure. In that context, they observed that the proceedings before an Income Tax Officer was judicial proceedings and all the incidents of such judicial proceedings had to be observed before the result was arrived at. A glance at the judgment should be sufficient to satisfy any one that the Supreme Court was dealing with a quite a different state of things and that merely because they called proceedings before an Income Tax Officer judicial proceedings, it does not follow that the proceedings held by an Income Tax Officer are to be judicial to the extent of the assessment order having to be pronounced in the presence of the assessee or at least on a date communicated to him. In my view, there is nothing either in section 25(3) or in the observations of the Supreme Court relied on by Mr. Sen to warrant the contention that an assessee under the Bengal Agricultural Income Tax Act is entitled either to be present at the time an order for his assessment is made or at least entitled to be informed of the date when the order will be made in cases where it is not made on the date of the hearing. The first contention of Mr. Sen must accordingly fail.

The first contention was, however, advanced merely in aid of the appellant's main contention which is that the assessment order was antedated and he was denied the legal right he had of inspecting the records proving that there had been antedating. It is said that under section 38(2) of the Act an assessment is to be completed within four years from the end of the assessment year concerned, except in certain cases, which are not here material. This provision, it is said, creates a right in favour of an assessee to be exempted from taxation for a particular assessment year, if the assessment is not completed within the time thus limited. The next step of the argument is that if such a right is created by the section, it is but ordinary justice that the assessee should have the means of asserting and enforcing that right when the need arises to do so and should have a full opportunity for proving that a particular assessment order, said to have been made within the period of limitation, was not, in fact, so made. The next step in the process of reasoning is that in order that an assessee may have the full opportunity for proving his case, when his allegation is that an assessment order against him was not made within the period of limitation, he ought obviously to have a right to inspect the original records and make out his allegations with materials derived from them. On the basis of this alleged right of an inspection of the records, it is contended in the present case that inspection was refused and thereby a statutory right of the appellant, although it might be an implied right, was infringed.

I shall deal with this contention presently on its merits, but I find one initial difficulty in the appellant's way. By his application under Article 226, he asked for the assessment order of the 28th March, 1952, and the subsequent

orders passed in appeals or applications by him to be quashed on the ground that the assessment order had really not been made within the period of limitation, but was antedated and that if such had been the case, he could no longer be assessed at all and not only the original order of assessment but the order for reassessment as well as void. It must be noticed, however, that if the appellant asked for an inspection of the records, he must have done so after the order of assessment had come to his notice and, therefore, after the order of assessment had been made and, consequently, the order of assessment could not possibly have been vitiated by a subsequent refusal of the authorities to give him the inspection he is said to have wanted. This demand for an inspection and a refusal of it, if such demand and refusal at all took place, was a separate matter altogether and I do not find that the appellant's application under Article 226 was framed in a way which could reach it in any manner at all. The assessment order could be declared to be void, only if it was found on an inspection of the records that it had been antedated and only if such ante-dating could be proved to the satisfaction of the authorities or the Court, but it might as well have been found on inspection that there was nothing to show that the order had been antedated. In those circumstances, I am quite unable to see how the order of assessment or the subsequent order for reassessment could be challenged as void on the ground of the former or having been antedated before it was proved that antedating had, in fact, taken place and how the alleged refusal of inspection could possibly be made a ground of attack on those orders. The appellant did not say that any order was made by any body refusing him inspection and did seek any relief against any such order.

I shall, however, put that difficulty on one side. On the merits of the question as to whether an assessee is entitled to an inspection of the records of his own assessment, it has been contended by Mr. Sen that section 56 of the Act ought not to be construed as applying even to the assessee himself and, alternatively, that if the section does really apply to the assessee as well, it is ultra vires the Constitution, I shall leave the second branch of this argument aside for the moment. Section 56 is expressed in absolute terms and so far as its language does, it does not seem to provide any room for a contention that it intends the assessee himself and third parties to be differently treated. The assessment records of any assessee often contain a great deal of confidential matter derived from secret sources and the view that there cannot be any compulsory disclosure of the records even to the assessee is at least a plausible view. It was, however, conceded on behalf of the respondents that an assessee would be entitled to an inspection of the assessment order itself, because he is entitled to a certified copy of it. If the assessee is entitled to have a certified copy of the order, it is obvious that the contents of the assessment order are not

intended to be kept back from him and if there be no such intention, there cannot be any objection of letting him inspect the original of the certified copy. The concession was qualified by a contention that the right of inspection could not extend to other materials on the record and that, in any event, an assessee could not have a roving inspection of the record as a whole in order to try to discover if there was any thing contained in it which would be of assistance to him.

In my view, the appellant is not entitled to make any complaint of refusal of inspection in the facts of the present case. It does not appear, and he does not even contend, that he ever demanded of the Income Tax Officer an inspection of even the original assessment order, not to speak of the assessment records as a whole. What he did was that when his appeal was pending before the Assistant Commissioner, he made an application to that appellate authority asking him to call for production of all the records and praying that after the records have arrived, he might be given an inspection of them before the hearing of the case. The prayer for permission to inspect the records was thus not made to the assessing authority at all, but it was made to an appellate authority in the course of the proceedings in the appeal and the prayer only was that the appellate authority might, in the exercise of its judicial functions, bring up the records and that the appellant, as a party to the appeal, might be allowed to inspect the records after they had arrived. A prayer of this kind made to an appellate authority, seized of an appeal, is something very different from a demand for inspection made of the assessing Officer or the Departmental authorities. In my view, the appellant never demanded inspection of the records from the assessing authorities at all. Nor does the matter end here. The Assistant Commissioner made no order on this prayer and did not refer to it in the course of his judgment. In the next appeal which the appellant took to the Tribunal, not a word was said about the refusal of inspection of the records, either in the grounds of appeal or, so far as it appears from the judgment, in the course of the argument before the Tribunal. The only fact about this contention of Mr. Sen about the refusal of inspection is that his client had asked the Assistant Commissioner to call up the records and to show him to see them after the records had been received. On the fact the appellant cannot possibly base any case that he had demanded inspection of records to which he had a right and that such inspection had been refused to him and his right had been denied. The second contention of Mr. Sen must, also therefore, fail.

I do not think I need deal, at length, with the contention that if section 56 of the Act applied to the assessee as well with respect to the records of his

own assessment, it is ultra vires the Constitution. It was said that a person had a right to hold property, including the income he made from his agricultural lands and if any restraint was placed on his opportunities for protecting that income from being taken away from him by taxation, Article 19(1) (f) of the Constitution was violated. I hold I do no injustice to Mr. Sen when I characterise this contention as only fantastic, as I observed when he was advancing the argument. I cannot possibly see any application of Article 19(1) (f) of the case of restrictions placed on the right to inspect the records of an assessment on the basis that such restriction constitutes an invasion of an assessee's right to hold property, that is to say, the income sought to be taxed.

It is lastly contended that the proviso to section 38(2) of the Act is void as being discriminatory and, therefore, no re-assessment can be made on a date lying beyond four years from the end of the assessment year. It is contended that under the proviso there is no time limit at all for a re-assessment directed by an appellate authority and that since the effect of such a provision is to discriminate between persons who are assessed and those who are re-assessed and to place the latter class of persons under a clear disadvantage, it offends against Article 14 of the Constitution and, therefore, is of no effect. I do not think that this argument is of any greater merit than the argument that section 56 of the Act constitutes an unreasonable restriction on the right to hold property. There is no question of discrimination here at all. All that the proviso directs is that while an assessment is to be completed by the taxing authorities within a certain time there will be no time limit when the assessment has been set aside and a proper assessment has been directed to be made. The Legislature obviously took into account the various exigencies of the administration of the Income Tax Law in freeing reassessment proceedings from any bar of time. If there is any discrimination at all, it is, to my mind, based on a classification in accordance with a rational basis properly related to the object of the Act. I am not of opinion that the proviso to section 38(2) of the Act is void and the argument that it is so appears to me to be plainly untenable.

For the reasons given above, this appeal is dismissed, but there will be no order for costs.

**Lahiri, J.:**—I agree.

N. C. S.

*Appeal dismissed.*

**END**